

No. 1

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In The OFFICE OF THE CLERK
Supreme Court of the United States

OAKLAND CITY UNIVERSITY,
founded by GENERAL BAPTISTS, INC.
d/b/a OAKLAND CITY UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA ex rel.
JEFFREY E. MAIN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

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QUESTION PRESENTED

The District Court dismissed relator's claim under the False Claims Act ("FCA"), 37 U.S.C. 3729 (2000), *et seq.*, finding that an uncertified statement by Petitioner, a university participating in the federal student aid program under the Higher Education Act of 1965 ("HEA"), in its Program Participation Agreement ("PPA") with the United States Department of Education ("ED") could not be the basis of FCA liability because the PPA is not a claim for federal funds. On appeal, a panel of the Seventh Circuit reversed, finding, in conflict with decisions of the Second, Fourth, Fifth, Ninth, and District of Columbia Circuit Courts of Appeal, that uncertified statements made in a federal program participation agreement may constitute false statements under the FCA. The Seventh Circuit's decision also directly conflicts with a decision of the Fifth Circuit which, on substantially identical facts, held that a statement in the PPA could not be used to support FCA liability against a university.

A single question is presented for review:

1. Whether an institution's statement that it will comply with general regulatory conditions, made in an agreement to participate in a federal program, may constitute a false statement under the False Claims Act, even where the statement is uncertified and is not a condition of payment under the program.

LIST OF PARTIES

The parties named in the caption are the only parties to this proceeding. The Department of Justice declined to intervene before the district court, but filed a Statement of Interest before the district court and appeared as *amicus curie* before the court of appeals. This petition is timely filed on February 15, 2006.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that Petitioner Oakland City University ("OCU"), founded by General Baptists, Incorporated, d/b/a Oakland City University has no parent company, and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 426 F.3d 914 (7th Cir. 2005). (Reproduced at App. 1a.) The court of appeals denied OCU's Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* on November 17, 2005 in an unreported decision. (Reproduced at App. 25a.) The opinion of the United States District Court for the Southern District of Indiana granting OCU's motion to dismiss is unreported. (Reproduced at App. 9a.)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000). The district court had jurisdiction over relator's claim pursuant to 31 U.S.C. § 3730(b) (2000). The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291 (2000). The court of appeals filed its opinion on October 10, 2005. It denied OCU's timely petition for panel rehearing or rehearing en banc on November 17, 2005.

STATUTORY AND REGULATORY PROVISIONS

Attached as appendices:

20 U.S.C. § 1001-1003	(at App. 25a-40a)
20 U.S.C. § 1094	(at App. 45a)
20 U.S.C. § 1099c	(at App. 66a)
31 U.S.C § 3729	(at App. 83a)

31 U.S.C. § 3730	(at App. 87a)
34 C.F.R. § 600.1–600.11	(at App. 97a)
34 C.F.R. § 600.20–600.21	(at App. 144a)
34 C.F.R. § 668.13– 668.14	(at App. 159a)

STATEMENT OF THE CASE

Oakland City University (“OCU”) is a private, non-profit institution of higher education founded in 1885 by the General Association of General Baptists. OCU is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools, the Association of Theological Schools and the National Council for Accreditation of Teacher Education. While the University enrolls significant numbers of traditional undergraduate students, it also focuses on serving qualified students from low income families and adults for whom higher education is not always accessible. OCU is a participant in federal student aid programs under Title IV of the Higher Education Act of 1965, as amended (20 U.S.C. § 1070 (2000) *et seq.*) (“HEA”).

Respondent Jeffrey Main (“Main”), a former OCU admissions representative, alleges that OCU paid its admissions staff commissions, bonuses, and other incentives based on their success in securing the enrollment of new students in violation of United States Department of Education (“ED”) regulations. Main seeks to benefit financially from this alleged regulatory violation by his filing of a *qui tam* action against OCU under the False Claim Act, 37 U.S.C. § 3729 (2000) (“FCA”). Although regulatory violations are not generally actionable under the FCA, Main

argues that FCA liability attaches in this instance because the ED regulation forbidding incentive compensation payments to admissions officers was incorporated into OCU's federal student aid Program Participation Agreement ("PPA").¹ The PPA is not a request or demand for government funds; however, university participation in the student aid program is a prerequisite for receipt by OCU's students of certain federal aid, including Federal Pell Grants, Federal Family Educational Loans, Federal Direct Loans, Perkins Loans, Federal Supplemental Education Opportunity Grants, Federal Work Study Funds (collectively, "Title IV Programs").

Main asserts that OCU's alleged misrepresentation in the PPA that it would comply with ED regulations, together with a student's subsequent request for federal financial aid, can support a finding of liability against OCU under the FCA. Such a finding would expose OCU to the FCA's severe sanctions – including significant statutory penalties, treble damages and attorneys' fees – for mere regulatory violations, regardless of their impact on the Title IV Programs or loss to the government.

The Federal Student Aid and PPA Process

University participation in the Title IV Programs is a multistage process. First, a school

¹ During the relevant time period, OCU executed two identical PPAs, both of which are included in the Appendix. See App. 197a; 227a.

must be deemed an "eligible institution." 34 C.F.R. §§ 600.4-600.6 (2005). Once an institution is deemed eligible, it may seek to participate in the student aid programs by requesting and executing the PPA, which sets forth terms and conditions of the program. 34 C.F.R. § 668.14(a)-(b) (2005). After an institution has executed the PPA, its students may complete an application for various forms of federal student financial assistance. However, unless and until an individual student applies for such assistance, is determined under distinct Title IV student eligibility regulations as eligible to receive such funds, and then applies such funds to tuition, fees and other educational expenses, no federal funds are paid.

The PPA is a form agreement that has two separate sections which set forth an institution's obligations as a participant in the Title IV Programs: 1) "General Terms and Conditions" and 2) "Certifications Required From Institutions" ("Certifications").

The General Terms and Conditions section contains the following provision:

The Institution understands and agrees that it is subject to and will comply with the program statutes and implementing regulations for institutional eligibility as set forth in 34 CFR Part 600 and for each Title IV, HEA Program in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV

of HEA, and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668.

(See App. 199a; 232a) Following this agreement of general compliance, the PPA sets forth an itemization of selected ED regulations, adopted directly from the ED's "General Provisions Regulations" at 34 CFR Part 668 ("General Provisions"). Included as one of the General Provisions is a prohibition on incentive-based admissions payments:

(22) [The University] will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assistance

(App. at 241a-242a.) The PPA contains no institutional certification regarding compliance with the General Terms and Conditions as a whole, or specifically, the incentive compensation prohibition.

The Certifications section contains an exclusive list of matters to which a university must certify in order to participate in the Title IV programs. In contrast to the agreements to comply with the General Provisions, the Certifications

section includes separate and specific certifications an institution must make regarding 1) lobbying activity; 2) debarment, suspension, and other government contracting responsibility matters; 3) drug-free workplace policies and programs; and 4) drug prevention programs. (App. at 247a-255a.) Institutions must also obtain certifications regarding debarment, suspension, ineligibility and voluntary exclusion from government contracting from lower tier contractors employed by the institution. (App. at 255a.) The Certifications section neither includes nor cross-references the incentive compensation prohibition nor any of the other General Provisions.²

In addition, the Certifications section expressly provides that a breach of the specified certifications constitutes a breach of the PPA. No similar statement regarding breach appears in the General Provisions section.

² In reprinting portions of 34 CFR Part 668, the General Provisions section does include reference to a separate certification to be made independent of the PPA. Item 12 of the General Provisions states that the institution "will provide the certifications described in paragraph (c) of [34 C.F.R. § 668.14]." (App. at 238a.) These certifications relate to the operation of a drug abuse and prevention program that is accessible to any officer, employee, or student at the institution; the establishment of a campus security policy in accordance with section 485(f) of the HEA; and compliance with certain disclosure requirements of 34 C.F.R. § 668.47 as required by section 487(f) of the HEA. None of these separate certifications are at issue in this case.

The Action Below

Main filed his *qui tam* case against OCU on April 28, 2003 in the U.S. District Court for the Southern District of Indiana. As is required under the FCA, the complaint remained under seal while the United States determined whether to intervene in the action. The United States declined to intervene on December 9, 2003, and the District Court lifted the seal. OCU then filed a Motion to Dismiss for Failure to State a Claim on March 5, 2004.

After consideration of OCU's Motion, Main's response, and OCU's reply, as well as a Statement of Interest filed by the U.S. Department of Justice ("DOJ") and OCU's response thereto, the District Court entered an order dismissing Main's complaint. (Reproduced at App. 9a.) The District Court found that OCU's execution of PPAs with ED did not constitute a demand or claim for government money. The District Court also found that OCU did not violate the FCA by making an implied certification because the PPA did not cause the government to pay any federal student financial aid funds and the government's eventual payment of the funds was not conditioned upon a certification of compliance made by OCU.

Main timely filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit rendered its decision on October 20, 2005, reversing the decision of the District Court. (Reproduced at App. 1a.) OCU timely filed its Petition for Panel Rehearing with

Suggestion for Rehearing *En Banc* on November 3, 2005. The Seventh Circuit denied the Petition on November 17, 2005. (Reproduced at App. 25a.)

REASONS FOR ALLOWANCE OF THE WRIT

This Court should issue a writ in order to resolve a split among the circuit courts and to clarify the breadth of the FCA's impact on the nation's varied but universally complex regulatory regimes.

Prior to the Seventh Circuit's decision below, every court that reviewed a regulatory scheme in the context of the FCA found that FCA liability could only attach where there was a significant nexus between a false statement and a claim made for government funds. Specifically, five circuit courts of appeal have found that a defendant is only liable under the FCA for false statements of compliance with a statute or regulatory scheme if the defendant was required to certify compliance with that statute or scheme and such certification was a precondition of government payment. See United States ex rel. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) (FCA liability attaches only where a party certifies compliance with a statute or regulation as a condition of government payment); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 (4th Cir. 1999) (holding that in false certification cases the government must have conditioned payment upon certification of compliance with a statute or regulation); United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997) ("where the government has conditioned payment of a claim

upon a claimant's certification of complaint with...a statute or regulation, ...a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation"); United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) ("It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit"); United States ex rel. Siewick v. Jamieson Science & Eng'g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000), ("It is the false *certification* of compliance which creates liability *when certification is a prerequisite to obtaining a government benefit*") (emphasis in original). Indeed, even prior Seventh Circuit precedent appears to have adopted this standard. See United States ex rel. Gross v. AIDS Research Alliance, 415 F.3d 601, 604 (7th Cir. 2005) (holding that any FCA claim premised upon certification of compliance with a statute or regulation requires that the certification be a condition of or a prerequisite to a government payment). In contrast to this line of precedent, the Seventh Circuit found that FCA liability could attach even where the statements at issue were uncertified, and where the statements were not a precondition of government payment.

This ruling creates inconsistent interpretation of federal law among the circuits and, for those in the Seventh Circuit, greatly expands the scope of FCA liability, subjecting participants in government funding programs to FCA liability for regulatory infractions they commit during their participation in those programs. As a result of the Seventh Circuit's decision, - general statements of regulatory

compliance in one stage of a multi-stage process – where no funds are requested from the government until a subsequent and often independent stage (and in this case by a third party) – may now be considered actionable false statements exposing universities to treble damages and penalties under the FCA. Ignoring the analysis of other circuit courts regarding the strength of the connection required between a false statement and a later claim for payment, the Seventh Circuit has reasoned that any false statement, regardless of generality, is integral to the causal chain leading to payment, and thus provides a basis for FCA liability. Main, 426 F.3d at 916. In so holding, the Seventh Circuit has created a circuit split on a significant matter of federal law. Compare Main, 426 F.3d at 916 (FCA liability is proper because false statements made at an initial stage of a multi-stage process are integral to a causal chain leading to payment), with Mikes, 274 F.3d at 697 (“a claim under the Act is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment”), and Hopper, 91 F.3d at 1266 (FCA liability can only attach to a false certification of compliance when that certification is a prerequisite to government benefit).

Further, the Seventh Circuit clearly misapplied the FCA in the context of the HEA. The causal nexus the panel found between the statements made in OCU’s PPA regarding incentive compensation and the government’s payment of Title IV funds to OCU students is simply too attenuated to support FCA liability. The PPA is not a request

for government funds. Such a request comes later, when students who wish to attend an institution complete the requisite applications to request federal student financial aid, which are evaluated on a student-by-student basis under independent regulatory criteria. That request for payment does not incorporate any of the representations from the PPA. Accordingly, the nexus between statements made in a PPA and a claim on the government fisc is tenuous at best.

The only other courts to have considered FCA liability in the context of the incentive compensation provision – the United States Court of Appeals for Fifth Circuit and the U.S. District Court for the Eastern District of California – have held exactly the opposite of the Seventh Circuit: that there can be no FCA liability for uncertified statements made in a PPA. In United States ex rel Graves v. ITT Educ. Svcs., 284 F. Supp. 2d 487 (S.D. Tex. 2003), aff'd per curiam, No. 03-20460, 2004 U.S. Dist. LEXIS 21799 (5th Cir.) cert denied, 125 S. Ct. 1896 (2005), the Court held that “general statement[s] of adherence to all regulations or statutes governing participation in a program” cannot support false claims liability. 284 F. Supp. 2d at 501. In United States ex rel. Hendow v. Univ. of Phoenix, No. S-03-CV-457, 2004 U.S. Dist. LEXIS 28990 (E.D. Cal. May 19, 2004), appeal docketed No. 04-16247 (June 21, 2004 9th Cir.) the court similarly held that the PPA’s reference to the incentive compensation was not a “certification which is a prerequisite for [the

institution] to receive federal funds,” and thus no FCA liability could attach.

The Seventh Circuit’s decision stands alone not only among those of courts that have considered the broader question of whether general statements of adherence to a regulatory scheme may, if false, give rise to FCA liability, but also among those that have considered the issue of FCA liability in the context of the HEA. In so ruling, the Seventh Circuit’s decision has effectively created two circuit splits, meriting review by this Court in order to provide a consistent interpretation of federal law across the nation.

I. Review Is Warranted To Resolve A Circuit Split Regarding Whether FCA Liability May Arise From An Uncertified Statement That Is Not A Precondition Of Payment.

The FCA imposes liability on an entity that “knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the Government...” 31 U.S.C. § 3729 (a)(2); Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003). The FCA was originally established after the Civil War to prevent fraudulent abuses that had befallen the union treasury after defense contractors overcharged the government by billing it for nonexistent goods. See Mikes, 274 F.3d at 692. As a result, the stated purpose of the FCA is to enhance “the Government’s ability to recover losses

sustained as a result of fraud against the Government.” S. Rep. No. 99-345 at 1 (1986). See also Graves, 284 F. Supp. 2d at 494. (“The purpose of the False Claims Act is ‘to provide for restitution to the government of money taken from it by fraud.’”)

The FCA was substantially amended in 1986 to combat the “pervasiveness” of modern fraud and now contains a *qui tam* provision, which permits a private litigant to file suit on behalf of the government and to obtain a percentage of the proceeds recovered on behalf of the government. See S. Rep. No. 99-345, at 1 (1986). Under the FCA, the pertinent inquiry is not merely whether a false statement was made, but whether that statement was made in an effort to get a false or fraudulent claim paid by the government. See, e.g. Thompson, 125 F.3d at 902 (“claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA...the FCA ‘interdicts material misrepresentations made to qualify for government privileges or services’”); United States v. Southland Mgmt. Corp., 326 F.3d 669, 675 (5th Cir. 2003) (“There is no liability under this Act for a false statement unless it is used to get [a] false claim paid.”).

Qui tam suits, like Main’s, which arise in the context of alleged regulatory misstatements have been generally classified as “legally false”

certification cases.³ Such cases are necessarily predicated on the theory that the defendant falsely represented "compliance with a federal statute or regulation or a prescribed contractual term." Mikes, 274 F.3d at 698. However, not every violation of a statute gives rise to FCA liability. See Thompson, 125 F.3d at 902 ("claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA."); see also Hopper, 91 F.3d at 1267 ("Mere regulatory violations do not give rise to a viable FCA action."). Where liability is predicated upon false representation of compliance with a federal statute or regulation, the Second, Fourth, Fifth, Ninth, and District of Columbia Circuits have uniformly concluded that liability may only attach where a defendant's certification of compliance with that statutory or regulatory scheme is a precondition of or prerequisite to government payment. See Mikes, 274 F.3d at 697 (requiring certification and that the statement is a condition of governmental payment"); Harrison, 176 F.3d at 787 (government must have conditioned payment upon certification of compliance with a statute or regulation.); Thompson, 125 F.3d at 902 (same); Hopper, 91 F.3d at 1266 (FCA liability attaches where a party's certification of compliance is a prerequisite to obtaining a

³ "Legally false" certification cases differ from the more typical *qui tam* suits involving a "factually false" certification, where a claim is made for goods which are not provided, or the value of goods is overstated. See Mikes, 274 F.3d at 697.

government benefit); Siewick, 214 F.3d 1372 (D.C. Cir. 2000), (same).⁴

The Seventh Circuit, without acknowledgement, disregarded the decisions of every other Circuit that has considered the issue, and substituted a "but for" causation analysis in place of the significant nexus between a false statement and a later claim made to the government that others circuit courts have required. That holding directly conflicts with the reasoning in prior precedents regarding the nexus required between a false statement and a claim for funds. Although all cases finding FCA liability require a causal connection between a statement and a claim, that statement is necessary, but not sufficient for liability. For liability to attach, the false statement must also be a

⁴ The Second, Ninth, and Tenth Circuits have held that in certain narrow cases FCA liability may attach under a theory of "implied certification." See Mikes, 274 F.3d at 700; Hopper, 91 F.3d at 1266; Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 532 (10th Cir. 2000). This theory was first recognized by the Court of Federal Claims, and permits FCA liability where a defendant makes a continuing submission of claims for payment, even where there is no express representation of compliance with the relevant statutory regime on the theory that such submissions implicitly certify compliance with the statute. See Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994). The Seventh Circuit below did not find that OCU had made an implied certification and, indeed, the Seventh Circuit has not expressly considered the issue of implied certification.

“condition” – or a prerequisite of – government payment.⁵

This¹ is not merely a semantic difference. Under the reasoning of the Seventh Circuit, OCU would be potentially liable for its non-compliance with any ED regulation pertaining to the student aid programs, not just those specifically listed in the PPA, because the General Terms and Conditions section of the PPA provides that OCU “understands and agrees that it is subject to and will comply with the program statutes and implementing regulations for institutional eligibility.” (App. at 232a.) Ultimately, the Seventh Circuit’s opinion allows for an uncertified false statement made at any time in the eligibility, participation, or request for funds process to be the basis for liability even where there is no direct connection between the statement and a later request for money, and completely ignores that in these particular circumstances the later request for money is neither made by the university (it is the student who ultimately applies for the funds), nor alleged to be false.

Supreme Court resolution of the circuit split created by the Seventh Circuit’s interpretation of the FCA is important because the Seventh Circuit’s decision will impact every entity that participates in any federal regulatory program under which the

⁵ By disregarding the requirement that the allegedly false statement be a condition of payment, the decision below also ignored the holding of a separate Seventh Circuit panel in Gross.

government pays funds, including but not limited to Title IV, Medicare, and the Department of Housing and Urban Development's subsidized mortgage programs.

II. Review Is Necessary To Resolve A Circuit Split Regarding Whether FCA Liability Can Attach To False Statements Made In A PPA.

The Seventh Circuit's opinion conflicts with the opinion of the United States Court of Appeals for the Fifth Circuit, the only other Court of Appeals to consider the issue of FCA liability arising from statements in a PPA. In holding that FCA liability may attach because statements made in a PPA are simply one stage in a multi-stage process seeking government funds, the Seventh Circuit's opinion also improperly merges the concepts of "institutional eligibility" under the HEA and "program participation" under Title IV. This is no minor point; the distinction is important as it relates to whether, in the specific context of the HEA, there is a sufficient causal nexus between the statements an institution makes in its PPA and a later claim for government funds, in the form of student financial assistance.

A. The PPA is not a claim made to the government and contains no certification.

OCU's PPA is far removed from the receipt of any government student aid funds by the institution. Before a PPA may even be issued to the institution,

the institution must first apply to ED for determinations that it is both an "eligible institution" under the HEA and that it is eligible to participate in the Title IV Programs. 34 C.F.R. § 600.20(a)-(b) (2005). The institutional eligibility requirements focus on the location, student body composition, educational program, and accreditation status of the institution. See 34 C.F.R. §§ 600.4-600.6. Assuming that ED determines an institution to be both an eligible institution and eligible for Title IV participation, the institution executes the PPA. No government monies from the Title IV Programs flow to the institution, however, unless and until individual students apply for and are determined eligible on a case-by-case basis to receive federal student financial assistance, which they then use to pay institutional charges and other educational expenses. Student eligibility for Title IV Program funds is determined according to a separate statutory and regulatory formula, with the specific amount of aid based on information submitted by the student in his or her Free Application for Federal Student Aid ("FAFSA"). See 20 U.S.C. §§ 1087kk - 1087ss.

Only when the institution has satisfied both the requirements of institutional eligibility and received a PPA and when students have satisfied the regulatory standards for individual student eligibility under the various Title IV Programs, can any government monies be transferred from ED to the institution. Even then, additional claims for funds—entirely separate from the PPA—must be made through subsequent processes. 34 C.F.R. § 668.161(b) (2005); 34 C.F.R. § 668.162 (2005); 34

C.F.R. § 668.163 (2005); 34 C.F.R. § 668.164 (2005). An institution does not receive the benefit of any government funds upon execution of the PPA.⁶ Rather, the PPA memorializes ED's determination that the institution is eligible to offer Title IV Programs to its students and sets forth the *prospective* terms of that participation. See 34 C.F.R. § 668.10 (2005); 34 C.F.R. § 668.14 (2005).

The organizational structure of the PPA clearly separates those provisions which are certifications from those which are general requirements of Title IV participation; under that structure, the institution is not required to certify its compliance with the incentive compensation provision. Moreover, the language of the PPA also distinguishes between the General Provisions, which are required by ED and apply prospectively, and the Certifications, which mandated by Congressional statute and related to past conduct. Specifically, in the General Provisions section, the institution "agrees that" it "will" prospectively comply with the

⁶ In certain instances, ED may "transmit" funds from certain Title IV Programs to an institution following execution of the PPA and prior to determining the eligibility of any individual student. Such amounts, however, are held by an institution in a fiduciary capacity for ED and must be maintained in a segregated "federal funds" trust account for disbursement upon individual students' demonstrated eligibility for such funds. The funds held in trust do not become institutional funds until such time as they are released from the trust account for the benefit of eligible students. See, e.g., 34 C.F.R. §§ 34 CFR 668.163-164. The funds held in trust are also subject to periodic reconciliation procedures with ED, and any excess funds must be returned to ED. See, e.g., 34 C.F.R. § 668.166.

specified terms and conditions, whereas in the Certifications section, the institution "certifies" that it has previously complied with the specifically-stated restrictions. (See, generally App. at 232a; 254a.) Congress could have required institutions to certify present compliance with the incentive compensation prohibition in the Certifications section, but chose not to do so. The Seventh Circuit has ignored this distinction, however, by holding that despite the lack of any certification by OCU of past compliance with the incentive compensation provision, OCU is nonetheless susceptible to FCA liability for its alleged non-compliance with the incentive compensation prohibition at some point after it executed the PPA.

B. The Seventh Circuit's decision conflicts with the Fifth Circuit's holding that only a certified statement in the PPA can be the basis of FCA liability.

In Graves, *supra*, the United States Court of Appeals for the Fifth Circuit analyzed the incentive compensation prohibition in the PPA for another institution and held that alleged misrepresentations of compliance with the regulation cannot form the basis of FCA liability. In Graves, the relators alleged that an institution's submission of PPAs to ED at a time it was allegedly violating the HEA's incentive compensation prohibition constituted a false certification of compliance with one of the requirements for participation in the Title IV Programs. The Defendants in Graves moved to dismiss on the grounds that relators' complaint

failed to allege a "claim" that was "false or fraudulent" or that was paid based on a "false statement." The court agreed and dismissed the complaint with prejudice.

The court acknowledged that under the FCA, a defendant may be liable for falsely certifying its compliance with a statute or regulation, but only when the government's payment of funds is expressly conditioned upon the making of such a certification. *Id.* at 497. Contrasting such mandatory certifications with general statements of adherence to the applicable regulations and statutes governing participation in a government program, the court found the latter "insufficient as a basis of False Claims Act liability." *Id.* at 501. The *Graves* court placed an institution's submission of a PPA squarely in the "general statement of adherence" category.

The PPA acknowledges the application of a number of Title IV, HEA requirements, but does not certify compliance with the regulation concerning incentive compensation. . . . The regulations require that, among the conditions of initial and continued eligibility for the Title IV, HEA program, the institution may not make incentive compensation payments to its student recruiters or admissions personnel. However, the regulation does not expressly condition the delivery or disbursement of funds to ITT students on ITT's

certification of compliance with this requirement.

Id. at 501 (emphasis added).

The issue of whether FCA liability may attach to uncertified statements in the PPA is a recurring one. Since its holding in Graves, the Fifth Circuit has upheld two additional District Court decisions holding that statements in a PPA do not give rise to a claim under the FCA. See United States ex rel Gay v. Lincoln Technical Inst., No. 3:01-CV-505-K, 2003 U.S. Dist. LEXIS 25968, aff'd 111 Fed. Appx. 286, 2004 U.S. App. LEXIS 21489, cert denied, 125 S. Ct. 1896 (2005) (holding that the relators failed to state a cognizable claim under the FCA because no funds flowed to the school as a result of the PPAs and because there was no certification of compliance in the attestation letters); see also United States ex rel Bowan v. Educ. America, Inc., No. 00-3028, slip op. (S.D. Tex. Jan 7, 2004), aff'd 116 Fed. Appx. 531, No. 04-20384, 2004 U.S. App. LEXIS 24673 (5th Cir. 2004), cert denied 125 S. Ct. 1869 (2005) (dismissing a complaint, nearly identical to the complaint in Graves, for the reasons stated in Graves).⁷

⁷ More recently, in Hendow, the U.S. District Court for Eastern District of California cited Hopper for the proposition that “[a] false certification of compliance with applicable law only gives rise to an FCA claim if certification of compliance with a particular statute is a prerequisite to obtaining a government benefit,” and then dismissed relator’s *qui tam* claim, after concluding that 20 U.S.C. § 1094(a), governing PPAs, “does not require a certification.” Hendow, 2004 U.S. Dist LEXIS 28990 at *2-*3.

Thus, not only does the Seventh Circuit's decision conflict with the broad principles articulated by several circuit courts of appeal limiting FCA liability to certified statements that are conditions to payment (see Section I.), it also directly conflicts with Fifth Circuit on the more narrow factual situation regarding whether non-compliance with the incentive compensation prohibition in the PPA may support FCA liability. Review of the Seventh Circuit's decision is necessary to resolve this conflict.

III. Review Of The Seventh Circuit's Decision Is Necessary To Limit The FCA To False Claims for Government Payment.

The impact of the Seventh Circuit's decision will be far reaching because it contains no limiting principle. The Seventh Circuit reasoned that potential liability against OCU was justified even though the PPA did not include a request for funds because it was part of a multi-stage process imposed by the HEA for obtaining federal student financial assistance. Finding that each stage in the HEA process was precondition to the next, the court found that "if a false statement is integral to a causal chain leading to payment, it is irrelevant how federal bureaucracy has appointed statements among layers of paperwork." Main, 426 F.3d at 916. However, this reasoning ignores the mandate that the FCA not be used as a regulatory tool, and permits treble damages where Congress has established a regulatory fine or penalty for violation subject to significant agency discretion. See Hopper, 91 F.3d at

1261 ("mere regulatory violations do not give rise to viable FCA action ... there are administrative and other remedies for regulatory violations").

Under the Seventh Circuit's reasoning, whenever Congress or a federal agency establishes requirements to participate in a government funding program, or creates a regime to enforce requirements for participation in such programs, a program participant may be subject to FCA liability if the government or a relator believes the participant did not live up to its obligations.⁸ This is not the purpose of the FCA, nor should it be the FCA's practical effect. See United States ex rel. Lamers v. Green Bay, 168 F.3d 1013, 1020 (7th Cir. 1999) ("the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations"). Indeed, the Fourth Circuit in Harrison, considered FCA liability based on statements made under a government program that required compliance with certain conditions as a prerequisite to payment. See Harrison, 176 F.3d at 786. The court held that the relator could state a claim under the FCA where Westinghouse made false statements, in connection with Department of Energy regulations, in its request for use of a subcontractor. As part of this holding, however, the court noted that FCA liability could not attach for mere statutory non-compliance,

⁸ It is of little comfort that under the Seventh Circuit's decision the relator would still need to prove that a university knowingly made a false statement of compliance. Such determinations are inherently fact specific and are not easily subject to early judicial resolution.

but instead could only attach where the defendant affirmatively *certified* its compliance and such compliance was a prerequisite to gaining a government benefit. The court also noted that every other court to consider the issue had reached the same conclusion. By requiring certification and that the false statement be a condition of receiving payment, the Fourth Circuit properly limited the reach of the FCA.

Moreover, where a misstatement in an application for participation or agreement to participate in a government program does not result in *per se* exclusion from that program, FCA liability would be a harsh penalty. For example, in the context of this case, an institution's failure to comply with the incentive compensation prohibition does not result in a *per se* loss of its Title IV participation. The enforcement of the Title IV participation standards is governed by Section 487(c) of the HEA (20 U.S.C. § 1094(c)). Within that provision, Congress delegated to the Secretary of ED significant discretion to determine whether a particular violation should result in administrative proceedings to recover federal funds, imposition of a civil penalty, or, in the most egregious cases as determined by the Secretary, limitation, suspension or termination of an institution's Title IV program participation. *Id.* Each of these proceedings is subject to due process within the agency before any final sanction may be imposed. *Id.* With specific regard to civil penalties for Title IV participation violations, Congress provided that:

Any civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of the penalty to the size of the institution of higher education subject to the determination, and the gravity of the violation, failure, or misrepresentation shall be considered.

20 U.S.C. § 1094(c)(3)(B)(ii). Through its enactment of this provision and other provisions in Section 487(c) (20 U.S.C. § 1094(c)), Congress clearly stated that not every violation causes an institution to lose its participation.⁹ This conclusion is buttressed by

⁹ The Seventh Circuit's opinion also states that institutional eligibility under the HEA is conditioned upon compliance with the incentive compensation provision, see United States ex rel. Main v. OCU, 426 F.3d at 916, incorrectly implying that an institution will lose its "eligible institution" status under the HEA where it fails to comply with the incentive compensation prohibition. This is simply not true. "Eligible institution" is a term of art under the HEA that has significance beyond the potential receipt of federal student aid funds through the Title IV Programs, and the application to obtain eligible status does not require certification of compliance with the incentive compensation provision. Institutions seek "eligibility" under the HEA for a variety of reasons, many of which do not involve Title IV Program participation. An institution of higher education that wishes to establish its status as an "eligible institution" under the HEA files an application with ED. See 20 U.S.C. § 1099c; 34 C.F.R. § 600.20. The application to obtain designation as an "eligible institution" makes no reference whatsoever – let alone require any statement or certification of compliance – regarding the incentive compensation rule.

(continued...)

ED's own determination in October 2002 that violation of the incentive compensation prohibition does not result in monetary losses to the government and *may* constitute grounds for termination of Title IV participation only "in some instances." See October 2002 Deputy Secretary of Education Memorandum to the Office of Federal Student Aid (Reproduced at App 194a).¹⁰

Thus, the determination of both Congress and ED is that penalties under the HEA for non-

(..continued)

After obtaining "eligible institution" status, an institution may also be certified as eligible to participate in the Title IV Programs and be presented with a boilerplate Program Participation Agreement from ED setting out the specific Title IV Programs the institution may offer its students, the term of its eligibility, and the regulatory and additional conditions which govern the institution's participation. 34 C.F.R. § 668.14(a)-(b). However, as was previously noted, there is simply no nexus between institutional eligibility under the HEA and the incentive compensation prohibition. The Seventh Circuit decision appears to imply such a connection and state that an institution will lose its "eligible institution" status under the HEA after violation of the PPA. Review of the Seventh Circuit's decision is necessary to correct this erroneously broad and unsupportable statutory interpretation, which effectively amends significant provisions of the HEA and impacts far more than institutions' participation in the Title IV Programs.

¹⁰ Allowing a relator to proceed with an FCA claim based on uncertified provisions of the PPA effectively takes all administrative discretion away from ED, by exposing an institution to treble damages, penalties and attorneys' fees for a technical violation, even if ED does not believe any sanction is merited.

compliance with various general regulatory provisions – including the incentive compensation prohibition – shall be measured by the impact that such non-compliance has on the purposes of the Title IV Programs (as determined by ED as the agency which regulates the Title IV Programs and issues the PPA). Such reasonable discretion is essential to the sound administration of a highly complex statutory and regulatory regime with millions of affected parties.¹¹ By contrast, the Seventh Circuit's opinion permits such discretion to be supplanted by the FCA for any alleged regulatory violation, along with its allowance of significant statutory penalties, treble damages and attorneys fees. Such a result could bankrupt and force the closure of many educational institutions, even where ED might determine on identical facts that the appropriate result is an administrative fine and to continue the institution's Title IV participation. Where the government does not automatically disqualify an institution from participation in a program based on a false statement, it follows that that false statement is insufficiently linked to the later claim made to the government for payment under FCA standards. United States ex rel. Ortega v. Columbia Healthcare, Inc., 240 F. Supp. 2d. 8, 19 (D.D.C. 2003) (finding support for the proposition that lack of proper

¹¹ Nationally, the Title IV Programs annually provide over \$90 billion of federal grants and federally-guaranteed loans to approximately 10 million undergraduate and graduate students. See The College Board, Trends in Student Aid, at 6 (2005); United States Department of Education, National Center for Education Statistics, 2003-04 National Postsecondary Student Aid Study (June 2005).

JCAHO certification could not affect the government's decision to pay under the FCA where the Center for Medicare and Medicaid Services' State Operations Manual did not provide for automatic disqualification upon an institutions loss of certification).

CONCLUSION

For all of the forgoing reasons, petitioner respectfully requests that this Court grant review of this matter.

Respectfully submitted,

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In the
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No. 05-2016

UNITED STATES of America ex rel. Jeffrey E.
MAIN,

Plaintiff-Appellant,

v.

OAKLAND CITY UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Evansville Division.
No. 3:03-cv-71 RLY-WGH – **Richard L. Young**,
Judge.

ARGUED SEPTEMBER 12, 2005 –
DECIDED OCTOBER 20, 2005

Before COFFEY, EASTERBROOK, and
EVANS, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Many federal subsidies under the Higher Education Act require multiple layers of paperwork. First the college or university submits an application to establish the institution's eligibility. If this application, which we call phase one, is granted, the institution and its students submit additional ("phase two")

applications for specific grants, loans, or scholarships. Both a statute, 20 U.S.C. §1094, and a regulation, 34 C.F.R. §668.14(b)(22)(i), condition institutional eligibility on a commitment to refrain from paying recruiters contingent fees for enrolling students. The concern is that recruiters paid by the head are tempted to sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans. Oakland City University assured the Department of Education on its phase-one application that it complies with the rule against contingent fees.

Jeffrey Main, the relator in this *qui tam* action under the False Claims Act, 31 U.S.C. §§3729-33, contends that the University's representation was fraudulent. According to the complaint, Main himself received contingent fees as a recruiter and later as the University's Director of Admissions. Initially Main thought the compensation system proper, but when he learned of the federal statute and rule he filed this suit. The district court dismissed it on the pleadings, see Fed. R. Civ. P. 12(b)(6), ruling that even wilful falsehoods in phase-one applications do not violate the Act, because the phase-one application requests a declaration of eligibility rather than an immediate payment from the Treasury. The phase-two applications for grants, loans, and scholarships are covered by the Act, the judge ruled, but are not false, because they do not repeat the assurance that the University abides by the rule against paying contingent fees to recruiters.

Given the posture of the litigation, we must assume (as the complaint alleges) that the University (a) knew of the prohibition against paying contingent fees to recruiters, and (b) lied to the Department of Education in order to obtain a certification of eligibility that it could not have obtained had it revealed the truth. These facts imply that the phase-two applications would not have been granted had the truth been told earlier, for all disbursements depended on the phase-one finding that the University was an eligible institution.

Although no published appellate decision to date has addressed the question whether a multi-stage process forecloses liability for fraud in the first stage, the answer is straightforward. The False Claims Act covers anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government". 31 U.S.C. §3729(a)(2). The University "uses" its phase-one application (and the resulting certification of eligibility) when it makes (or "causes" a student to make or use) a phase-two application for payment. No more is required under the statute. The phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn't true. (Likely the student does not know this, however, so the phase-two application is not fraudulent.) The statute requires a causal rather than a temporal connection between fraud and payment. See generally *United States ex rel. Lamers v. Green Bay*, 168 F.3d 1013, 1018 (7th Cir.1999). If a false statement is integral to a causal

chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.

The University protests that this approach would treat any violation of federal regulations in a funding program as actionable fraud, but that's wrong. A university that accepts federal funds that are contingent on following a regulation, which it then violates, has broken a contract. See *Gonzaga University v. Doe*, 536 U.S. 273 (2002). But fraud requires more than breach of promise: fraud entails making a false representation, such as a statement that the speaker will do something it plans not to do. Tripping up on a regulatory complexity does not entail a knowingly false representation.

To prevail in this suit Main must establish that the University not only knew, when it signed the phase-one application, that contingent fees to recruiters are forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. This distinction is commonplace in private law: failure to honor one's promise is (just) breach of contract, but making a promise that one intends not to keep is fraud. See, e.g., *Perlman v. Zell*, 185 F.3d 850 (7th Cir.1999); *Bower v. Jones*, 978 F.2d 1004, 1012 (7th Cir.1992). So if, as a district judge supposed in *United States ex rel. Graves v. ITT Educational Services*, 284 F. Supp. 2d 487 (S.D. Tex.2003), educational institutions do not certify to the Department of Education at the phase-one stage that they know about and comply with the rule against paying capitation fees for recruiting

students, then the University will win this suit whether or not it has violated that rule. But if the University knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.

Oakland City University relies heavily on a memorandum that the Deputy Secretary of Education circulated to subordinates in 2002. Such a memorandum has no legal effect; it was not published for notice and comment and does not authoritatively construe any regulation. The Department of Justice, though it elected not to take over the litigation, see 31 U.S.C. §3730(b)(2), has filed a brief as *amicus curiae* in this court contending that the allegations of the complaint, if true, demonstrate a right to recover under the False Claims Act. That view, and not one implied by a back-office memo, represents the position of the United States. Not that the memo offers the University much assistance even on its own terms. It states that a violation of the rule against incentive compensation usually does not lead to financial loss to the United States-for any given student may well have enrolled, and been eligible, anyway. The University argues from this that a fraudulent certification does not violate the False Claims Act. That's a non-sequitur. The statute provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify, and at the margin contingent payments will lead to *some* unwarranted enrollments (and thus some unjustified federal disbursements). That is, after all, why contingent payments are forbidden.

The judgment of the district court is reversed,
and the case is remanded for further proceedings
consistent with this opinion.

A true Copy:

Teste:

*Clerk of the United States Court
of Appeals for the Seventh Circuit*

**UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604**

JUDGMENT - WITH ORAL ARGUMENT

[ENTERED: October 20, 2005]

Date: October 20, 2005

BEFORE: Honorable JOHN L. COFFEY,
Circuit Judge

Honorable FRANK H.
EASTERBROOK, Circuit Judge

Honorable TERENCE T. EVANS,
Circuit Judge

No. 05-2016

**UNITED STATES OF AMERICA
ex rel. JEFFREY E. MAIN,**

Plaintiff – Appellant

v.

**OAKLAND CITY UNIVERSITY,
founded by GENERAL BAPTISTS,
INCORPORATED, doing business as
OAKLAND CITY UNIVERSITY,**

Defendant – Appellee

Appeal from the United States District Court for the
Southern District of Indiana, Evansville Division
No. 03 C 71, Richard L. Young, Judge

The judgment of the District Court is
REVERSED, with costs, and the case is
REMANDED. The above is in accordance with the
decision of this court entered on this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA *ex*
rel. JEFFREY E. MAIN,

Plaintiff,

v.

3:03-cv-71 RLY-WGH

OAKLAND CITY UNIVERSITY,
founded by GENERAL BAPTISTS,
INC., d/b/a OAKLAND CITY
UNIVERSITY,

Defendant.

[FILED March 15, 2005]

**ENTRY ON DEFENDANT'S MOTION TO
DISMISS**

In April 2003, Plaintiff Jeffrey Main ("Main") filed this case against his former employer, Oakland City University ("OCU"), alleging that OCU has violated the False Claims Act ("FCA"), 31 U.S.C. § 3729, et seq. In March 2004, OCU responded to Main's complaint with a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The court heard oral argument on OCU's Motion to Dismiss on January 14, 2005. For the following reasons, OCU's Motion to Dismiss is **granted**.

I. Background

In 1998, Main was hired by OCU as an admissions representative charged with recruiting students for OCU's adult degree programs. (Complaint ¶ 7). He was paid a base salary of \$22,000 and additional commissions and bonuses based on his success in enrolling students. (Complaint ¶ 8-9). Main was promoted to Director of Admissions in 1999, where he continued to receive commissions and bonuses. Before, during, and after Main's employment with OCU, the university paid other employees commissions and bonuses as well, based on their success in enrolling students. (Complaint ¶ 13).

At some point, Main learned that OCU's practice of paying commissions and bonuses to recruiters was in contradiction to the provisions of the Program Participation Agreements ("PPAs") that OCU had filed with the federal government. (Complaint ¶ 14-15). The PPAs were filed as required by the Higher Education Act ("HEA"), so that OCU could participate in government-sponsored student financial aid programs. (Complaint ¶ 15). Main alleges that OCU's commission and bonus structure violated 20 U.S.C.A. § 1094 of the HEA and 34 C.F.R. § 668.14(b)(22)(I), both of which forbid PPA bound institutions from granting enrollment-based commissions. (Complaint ¶ 18-19). Main further alleges that OCU was aware that its commission and bonus policy was in contradiction to the provisions of the HEA's institutional eligibility requirements.

Main's complaint against OCU seeks damages and injunctive relief under three sections of the FCA, 31 U.S.C. § 3729, et seq. The FCA allows for a relator, such as Main, to bring a *qui tam* action, meaning that he is suing in the name of the United States government on behalf of both himself and the government. 31 U.S.C. § 3730(a). After a *qui tam* action is filed under the FCA, the United States has the option of either intervening and taking over the case or allowing the relator to continue with the case. In December 2003, the United States gave notice that it declines to intervene in this case. The United States remains the real party in interest, however, and Main is a partial assignee. *United States ex rel. Zissler v. Regents of University of Minnesota*, 154 F.3d 870, 872 (8th Cir. 1990).

II. Motion to Dismiss Standard

When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court examines the sufficiency of the complaint, not the merits of the lawsuit. Fed. R. Civ. P. 12(b)(6); *United States v. Clark County, Ind.*, 113 F.Supp.2d 1286, 1290 (S.D. Ind. 2000). The court will dismiss a complaint for failure to state a claim only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hamlin v. Vaudenberg*, 95 F.3d 580, 583 (7th Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In making its determination, the court accepts the allegations in the complaint as true, and it draws all reasonable inferences in favor of the plaintiff. *Mallett v. Wisconsin Div. Of Vocational Rehabilitation*, 130

F.3d 1245, 1248 (7th Cir. 1997); *Porter v. DiBlasio*, 93 F.3d 301, 305 (7th Cir. 1996). Additionally, the court will consider facts presented in exhibits attached to the complaint. *See, Zinerman v. Burch*, 494 U.S. 113. In accordance with this standard, the facts outlined above are accepted as Main alleges them.

III. Analysis

The essence of Main's allegations is that OCU violated the FCA by knowingly filing false claims that caused the government to pay out HEA Title IV funds, including but not limited to Pell Grants, Perkins Loans, and Federal Work Study Funds. (Complaint ¶ 17). Main brings three claims against OCU, for respective violations of subsections (a)(1), (a)(2), and (a)(3) of the FCA. 31 U.S.C. § 3729. His first claim, based on subsection (a)(1), alleges that OCU knowingly or recklessly presented the government with false claims in the form of PPAs, and that those claims caused payments to be made by the government. (Complaint ¶ 23). Main's second claim, based on subsection (a)(2), alleges that OCU "made, used or caused to be made or used, false records or statements to get false or fraudulent claims approved by the Government." (Complaint ¶ 26). And his third claim, based on subsection (a)(3), alleges that OCU conspired to defraud the government. (Complaint ¶ 29).

OCU's motion to dismiss Main's claims is premised on three arguments. First, OCU argues that this case does not fall within the jurisdiction of the federal courts because Congress has vested the

authority to enforce the HEA exclusively with the Secretary of Education ("Secretary"). (Defendant Oakland City University's Motion to Dismiss ¶ 1). Second, OCU argues that even if this court has jurisdiction, Main has not alleged an actionable false claim under the FCA. (*Id.*). Finally, OCU argues that Main's third claim must be dismissed because he does not properly allege the elements of conspiracy. (Defendant Oakland City University's Brief in Support of Defendant's Motion to Dismiss ("OCU Brief") at 20). The court considers OCU's arguments for dismissal in turn.

A. Jurisdiction

According to OCU, this court does not have jurisdiction over the case before it because the HEA has preempted the FCA. Even if the HEA has not preempted the FCA (which would mean that there is federal court jurisdiction over the case), OCU asks the court to defer to the Secretary's enforcement of HEA regulations under the doctrine of primary jurisdiction.

1. Preemption

OCU argues that Congress has given the Secretary *exclusive* authority to enforce the HEA requirements and that Main cannot circumvent the HEA's regulatory scheme by invoking the FCA. (OCU Brief at 6-7). According to OCU, if relators such as Main are allowed to go forth with FCA claims "the Secretary's authority will be eviscerated and the underlying purpose of the HEA defeated as complainants forego administrative channels in hopes of reaping a windfall for HEA violations." (*Id.* at 11).

The HEA and the FCA serve different functions. The HEA's overarching purpose is "to assist in making available the benefits of post-secondary education to eligible students." 20 U.S.C. § 1070. The remedies available to the Secretary under the HEA include a variety of enforcement mechanisms, including limitation, suspension, or termination of an institution's participation in HEA programs. 20 U.S.C. § 1094(c)(1)(F). Also, if monetary penalties are assessed against an institution under the HEA, the Secretary has the discretion to alter the amount owed by the institution on the basis of the institution's size or the severity of the violation. 20 U.S.C. § 1094(c)(3)(B)(ii).

In contrast to the HEA, the FCA has the overarching purpose of enhancing "the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5266;

see also, *United States v. Hess*, 317 U.S. 537, 551 (1943) (defining the FCA's purpose as "to provide for restitution to the government of money taken from it by fraud"). Penalties under the FCA are less discretionary than those under the HEA. Monetary penalties accrue on a per-violation basis, and attorney's fees and costs of litigation are automatically awarded if the relator is successful. 31 U.S.C. § 3729(a). Damages are trebled unless the defendant cooperates with the government's investigation, in which case damages are still doubled. *Id.* The *qui tam* relator in an FCA action is awarded between fifteen and thirty percent of the damages, depending on his or her role in the case, and the remainder goes to the United States. 31 U.S.C. § 3730(d).

OCU does not identify a specific part of the text of the HEA or its legislative history that indicates that Congress intended for the HEA to preempt the FCA. Rather, OCU argues that the HEA implicitly preempts the FCA because the Secretary has the power to enforce the HEA. (OCU Reply Brief at 2). But the court "is not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265-66 (1992) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). In light of the differing purposes of the HEA and the FCA, and because there is no explicit preemption, the court finds that

Congress intended for both statutory schemes to be effective.¹

2. RICO Precedents

As part of its preemption argument, OCU contends that this case is analogous to several cases wherein courts have held that certain HEA violations cannot be the basis for RICO actions. (OCU Brief at 7-8). See *McCulloch v. Educ. Finance Group*, 2001 U.S. Dist. LEXIS 24387 (S.D. Fla. Oct 18, 2001), *aff'd sub nom. McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217 (11th Cir. 2002); *New York Inst. of Dietetics, Inc. v. Great Lakes Higher Educ. Corp.*, 1995 U.S. Dist. LEXIS 13692 (S.D.N.Y. Sept 19, 1995). OCU asks the court to draw a broader principal from the RICO cases: that "a party may not invoke a statutory enforcement mechanism to circumvent the Secretary's exclusive jurisdiction by pleading an HEA violation as a predicate offense under another statute." (Defendant OCU's Response to the United States' Statement of Interest at 12). This court declines to extend the RICO case holdings and instead looks to FCA precedent as guiding.

Several courts have held that FCA actions can be premised on HEA violations. In *Gibson v. Colorado Student Loan Program*, the court allowed the *qui tam* relator to proceed with his FCA claim based on violations of the HEA. 1996 WL 944285 (D.

¹ The court notes that many other federal courts have exercised jurisdiction over similar claims. *E.g.*, *Unites States ex rel. Bowman v. Education America, Inc.*, 116 Fed.Appx. 531 (5th Cir. 2004); *United States ex rel. Haskins v. Omega Institute, Inc.*, 11 F.Supp.2d 555 (D.N.J. 1998).

Colo. May 3, 1996); *see also*, *United States v. St. Augustine College*, 1991 WL 222099 (N.D. Ill. Oct. 21, 1991) (finding defendant liable under the FCA for disbursing Title IV Pell Grant money to ineligible students). The *Gibson* court explained that "Plaintiff must do more than point to violations of the HEA. He must show how violations of the HEA are also violations of the FCA or how they caused violations of the FCA." *Id.* at *5. Accordingly, an FCA claim can be premised on an HEA claim.

3. Primary Jurisdiction

In its final jurisdictional argument, OCU invokes the doctrine of primary jurisdiction and contends that, even if the FCA applies here, the court should stay this case pending referral to the Secretary. (OCU's Reply Brief at 5). The doctrine of primary jurisdiction applies when enforcement of a claim requires the resolution of issues that are within the specialized competence of an administrative body, such as the Secretary in this case. *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991). Application of the doctrine is decided on a case-by-case basis, taking into consideration the purpose behind the statute involved and the relevance of the administrative body's expertise. *Id.* at 131. In this case, the Secretary has expertise in applying the HEA, but the Secretary has no authority to enforce the FCA. As such, the court declines to apply the doctrine of primary jurisdiction to this case.

B. Allegation of a False Claim

In the Seventh Circuit, an actionable false claim under the FCA consists of three elements: "(1) the defendant made a record or statement in order to get the government to pay money; (2) the record or statement was false or fraudulent; and (3) the defendant knew it was false or fraudulent." *United States ex rel. Lamers v. Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (citing 31 U.S.C. § 3729(a)(2)). Main's complaint fails to meet the first of these elements because OCU did not make a claim in order to receive government funds. The PPAs are not claims because they do not directly demand money from the government. Furthermore, while false certifications of compliance can be the basis for FCA liability (that is, they can be considered a "claim"), the PPAs do not qualify as certifications of compliance with the HEA. As such, Main has not alleged an actionable false claim.

1. Express Demands for Government Funds

The PPAs at issue here are not demands or claims for government money because funds do not flow to OCU when it signs the PPAs. The PPAs merely establish the institution's eligibility for participation in Title IV programs. (OCU Brief at 13). Funds do not flow to OCU until students apply for and receive financial aid, and then use that aid to pay tuition and fees to the school. (*Id.*). Since there are multiple steps between the submission of the PPAs and OCU's actual receipt of funds, the PPAs cannot be considered a direct claim for government funds.

Main argues that the first *Lamers* element is met in this case (i.e., that there is a claim), and that the *Lamers* opinion itself supports his position. The relator in *Lamers* was the owner of a bus company in the Green Bay area. 168 F.3d at 1014. Mr. Lamers lost his account with the local public school district when the district decided to contract with the city-owned Green Bay Transit ("GBT") to transport students to and from school on public buses. *Id.* Since Green Bay was receiving annual grants from the Federal Transit Administration ("FTA"), it was obligated to run its buses in compliance with certain federal statutes and regulations. *Id.* The GBT buses began transporting students in a pilot program in the spring of 1993. *Id.* at 1015. By September 1995, GBT was operating in full compliance with FTA regulations. *Id.* at 1016. Mr. Lamers brought his FCA action based on the transitional period from 1993 to 1995, when GBT was in violation of FTA requirements because, for example, the published transit system maps did not show the new routes that had been created to accommodate student passengers and "buses sometimes made mid-block stops near schools." *Id.* at 1015.

The *Lamers* court found that Mr. Lamers' "claim [met] the first element because the City's statements in its annual application and letters to the FTA were clearly made in an effort to get the federal government to continue paying the City money." *Id.* at 1018. However, the *Lamers* court ultimately found in favor of the City, because "minor technical violations . . . seem normal for a new bus program," *id.* at 1019, and "the FCA is not an appropriate vehicle for policing technical compliance

with administrative regulations.” *Id.* at 1020; see Defendant OCU’s Reply to Plaintiff’s Brief in Opposition to Defendant’s Motion to Dismiss (“OCU Reply Brief”) at 3.

Main argues that OCU’s statements in the PPAs are analogous to Green Bay’s statements to the FTA. The court disagrees. In *Lamers* there was no middleman – no series of steps – between the FTA and Green Bay. In the case at bar, the interim steps of the students applying for, receiving, and conveying the Title IV funds from the government to OCU make it impossible for the PPAs to function as direct claims for government funds.

2. Implied Certifications of Compliance

In the absence of an express claim for government funds, the FCA can still be violated by an implied certification of compliance, when the government’s payment of funds is conditioned upon the making of such a certification.² In the case at

² An implied certification can, theoretically, be based on either express or implicit requirements found in the underlying statute (here, in the HEA). Since there is neither an express nor an implied certification of compliance in the PPAs, the “express versus implied” issue is not before this court; however, it is worth noting that there are inconsistencies within the circuits regarding exactly when an implied certification of compliance can form the basis for an FCA claim. See *United States ex rel. Graves v. ITT Educational Services, Inc.*, 2004 WL 2376217, *1, n.2 (5th Cir. Oct. 20, 2004) (per curiam) (“[w]hile this Circuit has decided cases dealing with FCA liability based on express certifications of compliance with various statutes and regulations, we have not specifically addressed whether

bar, however, there is no such certification. The PPAs were signed in order to establish OCU's eligibility to participate in Title IV HEA programs, but, as explained above, the PPAs themselves did not cause the government to pay out HEA funds.

OCU itself concedes that in order for it to receive Title IV funds, it "*must* execute the PPA, which becomes effective once countersigned by the Secretary or a designated Department of Education official." (OCU Brief at 15) (emphasis added). In this way, the filing of the PPA necessarily happens prior in time to the flow of Title IV funds to the school. But the function of the PPA, as explained on the front page of the PPA itself, is to establish an institution's eligibility to participate in HEA programs, and not to immediately direct money to the institution: "the execution of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued *participation in* any Title IV, HEA Program." (Defendant's Ex. 1 at 1 (emphasis added)).

FCA liability can be based on an 'implied certification' theory"); *Mikes v. Straus*, 274 F.3d 687, 700 (2nd Cir. 2001) ("implied false certification is appropriately applied only when the underlying statute *expressly* states the provider must comply in order to be paid") (emphasis original); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 n.8 (4th Cir. 1999) (not ruling on the issue, but noting that the validity of implied certification claims in the Fourth Circuit is "questionable"); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (accepting theory of implied certification, but not finding such a certification based on the facts). The Seventh Circuit has not squarely addressed this issue.

In *Graves*, a case very similar to the one at bar, the Fifth Circuit affirmed the District Court's dismissal of the case, finding that "nothing in the PPA required ITT expressly to certify compliance with the provision prohibiting incentive payments." *United States ex rel. Graves v. ITT Educational Services, Inc.*, 284 F.Supp.2d 487, 500 (S.D.Tex. 2003), *aff'd per curiam*, 2004 WL 2376217, *1, n.2 (5th Cir. Oct. 20, 2004). The *Graves* court drew a distinction between a broad, general statement of adherence, such as a PPA, and those particular statements which are necessary prerequisites to receiving payments. *Id.* at 500-01. Ultimately, the *Graves* court held that "[a] general statement of adherence to all regulations or statutes governing participation in a program through which federal funds are received is insufficient as a basis of False Claims Act liability." *Id.* at 501. This court agrees. A PPA does not constitute a certification of compliance.

C. The Conspiracy Claim

General civil conspiracy standards apply to conspiracy claims brought under the FCA. *U.S. ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999). Main fails to allege facts that support his third claim, which contends that OCU engaged in a conspiracy. Specifically, Main fails to allege that OCU entered into an agreement with any other party to submit fraudulent PPAs. *See, Durcholz*, 189 F.3d at 545-6 (upholding summary judgment when there was inadequate evidence to show a meeting of the conspiratorial minds). Therefore, Main's third count against OCU will be dismissed (and it would

have been dismissed even had his other charges survived OCU's Motion to Dismiss).

IV. Conclusion

For the foregoing reasons, the court finds that Main has not alleged sufficient facts to support his claims. Therefore, OCU's motion to dismiss is **granted** in its entirety.

It is so ordered this 15th day of March 2005.

/s/

RICHARD L. YOUNG, JUDGE

United States District Court

Southern District of Indiana

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United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

November 17, 2005

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

UNITED STATES OF

AMERICA ex rel.

Jeffrey E. Main,

Plaintiff-Appellant,

No. 05-2016 v.

OAKLAND CITY UNIVERSITY,

Defendant-Appellee.

Appeal from the

United States

District Court for

the Southern

District of Indiana,

Evansville Division.

No. 3:03-cv-71

RLY-WGH

Richard L. Young,

Judge.

[ENTERED: November 17, 2005]

Order

Defendant-appellee filed a petition for rehearing and rehearing en banc on November 3, 2005. No judge in regular active service has

requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Effective: October 01, 1998

UNITED STATES CODE ANNOTATED
TITLE 20. EDUCATION
CHAPTER 28--HIGHER EDUCATION
RESOURCES AND STUDENT ASSISTANCE
SUBCHAPTER I--GENERAL PROVISIONS
PART A--DEFINITIONS

→§ 1001. General definition of
institution of higher education

(a) Institution of higher education

For purposes of this chapter, other than subchapter IV and part C of subchapter I of chapter 34 of Title 42, the term "institution of higher education" means an educational institution in any State that--

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) Additional institutions included

For purposes of this chapter, other than subchapter IV and part C of subchapter I of chapter 34 of Title 42, the term "institution of higher education" also includes--

(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a) of this section; and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1) of this section, admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located.

(c) List of accrediting agencies

For purposes of this section and section 1002 of this title, the Secretary shall publish a list of nationally

recognized accrediting agencies or associations that the Secretary determines, pursuant to subpart 2 of part G of subchapter IV of this chapter, to be reliable authority as to the quality of the education or training offered.

Current through P.L. 109-169 (excluding P.L. 109-162,109-163)approved 01-11-06

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Effective: October 10, 2003

UNITED STATES CODE ANNOTATED
TITLE 20. EDUCATION
CHAPTER 28--HIGHER EDUCATION
RESOURCES AND STUDENT ASSISTANCE
SUBCHAPTER I--GENERAL PROVISIONS
PART A--DEFINITIONS

→§ 1002. Definition of institution of
higher education for purposes of
student assistance programs

(a) Definition of institution of higher education for
purposes of student assistance programs

(1) Inclusion of additional institutions

Subject to paragraphs (2) through (4) of this
subsection, the term "institution of higher
education" for purposes of subchapter IV of this
chapter and part C of subchapter I of chapter 34 of
Title 42 includes, in addition to the institutions
covered by the definition in section 1001 of this
title--

(A) a proprietary institution of higher
education (as defined in subsection (b) of this
section);

(B) a postsecondary vocational institution (as
defined in subsection (c) of this section); and

(C) only for the purposes of part B of
subchapter IV of this chapter, an institution
outside the United States that is comparable to

an institution of higher education as defined in section 1001 of this title and that has been approved by the Secretary for the purpose of part B of subchapter IV of this chapter.

(2) Institutions outside the United States

(A) In general

For the purpose of qualifying as an institution under paragraph (1)(C), the Secretary shall establish criteria by regulation for the approval of institutions outside the United States and for the determination that such institutions are comparable to an institution of higher education as defined in section 1001 of this title (except that a graduate medical school, or a veterinary school, located outside the United States shall not be required to meet the requirements of section 1001(a)(4) of this title). Such criteria shall include a requirement that a student attending such school outside the United States is ineligible for loans made, insured, or guaranteed under part B of subchapter IV of this chapter unless--

(i) In the case of a graduate medical school located outside the United States

(I)(aa) at least 60 percent of those enrolled in, and at least 60 percent of the graduates of, the graduate medical school outside the United States were not persons described in section 1091(a)(5) of this title in the year

preceding the year for which a student is seeking a loan under part B of title IV; and

(bb) at least 60 percent of the individuals who were students or graduates of the graduate medical school outside the United States or Canada (both nationals of the United States and others) taking the examinations administered by the Educational Commission for Foreign Medical Graduates received a passing score in the year preceding the year for which a student is seeking a loan under part B of subchapter IV of this chapter; or

(II) the institution has a clinical training program that was approved by a State as of January 1, 1992; or

(ii) in the case of a veterinary school located outside the United States that does not meet the requirements of section 1001(a)(4) of this title, the institution's students complete their clinical training at an approved veterinary school located in the United States.

(B) Advisory panel

(i) In general

For the purpose of qualifying as an institution under paragraph (1)(C) of this subsection, the Secretary shall establish an advisory panel of medical experts that shall-

(I) evaluate the standards of accreditation applied to applicant foreign medical schools; and

(II) determine the comparability of those standards to standards for accreditation applied to United States medical schools.

(ii) Special rule

If the accreditation standards described in clause (i) are determined not to be comparable, the foreign medical school shall be required to meet the requirements of section 1001 of this title.

(C) Failure to release information

The failure of an institution outside the United States to provide, release, or authorize release to the Secretary of such information as may be required by subparagraph (A) shall render such institution ineligible for the purpose of part B of subchapter IV of this chapter.

(D) Special rule

If, pursuant to this paragraph, an institution loses eligibility to participate in the programs under subchapter IV of this chapter and part C of subchapter I of chapter 34 of Title 42, then a student enrolled at such institution may, notwithstanding such loss of eligibility, continue to be eligible to receive a loan under part B while attending such institution for the academic year succeeding the academic year in which such loss of eligibility occurred.

(3) Limitations based on course of study or enrollment

An institution shall not be considered to meet the definition of an institution of higher education in paragraph (1) if such institution--

(A) offers more than 50 percent of such institution's courses by correspondence, unless the institution is an institution that meets the definition in section 2471(4)(C) of this title;

(B) enrolls 50 percent or more of the institution's students in correspondence courses, unless the institution is an institution that meets the definition in such section, except that the Secretary, at the request of such institution, may waive the applicability of this subparagraph to such institution for good cause, as determined by the Secretary in the case of an institution of higher education that provides a 2- or 4-year program of instruction

(or both) for which the institution awards an associate or baccalaureate degree, respectively;

(C) has a student enrollment in which more than 25 percent of the students are incarcerated, except that the Secretary may waive the limitation contained in this subparagraph for a nonprofit institution that provides a 2- or 4-year program of instruction (or both) for which the institution awards a bachelor's degree, or an associate's degree or a postsecondary diploma, respectively; or

(D) has a student enrollment in which more than 50 percent of the students do not have a secondary school diploma or its recognized equivalent, and does not provide a 2- or 4-year program of instruction (or both) for which the institution awards a bachelor's degree or an associate's degree, respectively, except that the Secretary may waive the limitation contained in this subparagraph if a nonprofit institution demonstrates to the satisfaction of the Secretary that the institution exceeds such limitation because the institution serves, through contracts with Federal, State, or local government agencies, significant numbers of students who do not have a secondary school diploma or its recognized equivalent.

(4) Limitations based on management

An institution shall not be considered to meet the definition of an institution of higher education in paragraph (1) if--

(A) the institution, or an affiliate of the institution that has the power, by contract or ownership interest, to direct or cause the direction of the management or policies of the institution, has filed for bankruptcy, except that this paragraph shall not apply to a nonprofit institution, the primary function of which is to provide health care educational services (or an affiliate of such an institution that has the power, by contract or ownership interest, to direct or cause the direction of the institution's management or policies) that files for bankruptcy under chapter 11 of Title 11, between July 1, 1998, and December 1, 1998; or

(B) the institution, the institution's owner, or the institution's chief executive officer has been convicted of, or has pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of funds under subchapter IV of this chapter and part C of subchapter I of chapter 34 of Title 42, or has been judicially determined to have committed fraud involving funds under subchapter IV of this chapter and part C of subchapter I of chapter 34 of Title 42.

(5) Certification

The Secretary shall certify an institution's qualification as an institution of higher education in accordance with the requirements of subpart 3 of part G of subchapter IV of this chapter .

(6) Loss of eligibility

An institution of higher education shall not be considered to meet the definition of an institution of higher education in paragraph (1) if such institution is removed from eligibility for funds under subchapter IV of this chapter as a result of an action pursuant to part G of subchapter IV of this chapter.

(b) Proprietary institution of higher education

(1) Principal criteria

For the purpose of this section, the term "proprietary institution of higher education" means a school that--

(A) provides an eligible program of training to prepare students for gainful employment in a recognized occupation;

(B) meets the requirements of paragraphs (1) and (2) of section 1001(a) of this title;

(C) does not meet the requirement of paragraph (4) of section 1001(a) of this title;

(D) is accredited by a nationally recognized accrediting agency or association recognized by the Secretary pursuant to part G of subchapter IV of this chapter;

(E) has been in existence for at least 2 years; and

(F) has at least 10 percent of the school's revenues from sources that are not derived from funds provided under subchapter IV of this chapter and part C of subchapter I of chapter 34 of Title 42 , as determined in accordance with regulations prescribed by the Secretary.

(2) Additional institutions

The term "proprietary institution of higher education" also includes a proprietary educational institution in any State that, in lieu of the requirement in paragraph (1) of section 1001(a) of this title, admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located.

(c) Postsecondary vocational institution

(1) Principal criteria

For the purpose of this section, the term "postsecondary vocational institution" means a school that--

(A) provides an eligible program of training to prepare students for gainful employment in a recognized occupation;

(B) meets the requirements of paragraphs (1), (2), (4), and (5) of section 1001(a) of this title; and

(C) has been in existence for at least 2 years.

(2) Additional institutions

The term "postsecondary vocational institution" also includes an educational institution in any State that, in lieu of the requirement in paragraph (1) of section 1001(a) of this title, admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located.

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UNITED STATES CODE ANNOTATED
TITLE 20. EDUCATION
CHAPTER 28--HIGHER EDUCATION
RESOURCES AND STUDENT ASSISTANCE
SUBCHAPTER I--GENERAL PROVISIONS
PART A--DEFINITIONS

→§ **1003. Additional definitions**

In this chapter:

(1) Combination of institutions of higher education

The term "combination of institutions of higher education" means a group of institutions of higher education that have entered into a cooperative arrangement for the purpose of carrying out a common objective, or a public or private nonprofit agency, organization, or institution designated or created by a group of institutions of higher education for the purpose of carrying out a common objective on the group's behalf.

(2) Department

The term "Department" means the Department of Education.

(3) Disability

The term "disability" has the same meaning given that term under section 12102(2) of Title 42.

(4) Elementary school

The term "elementary school" has the same meaning given that term under section 7801 of this title.

(5) Gifted and talented

The term "gifted and talented" has the same meaning given that term under section 7801 of this title.

(6) Local educational agency

The term "local educational agency" has the same meaning given that term under section 7801 of this title.

(7) New borrower

The term "new borrower" when used with respect to any date means an individual who on that date has no outstanding balance of principal or interest owing on any loan made, insured, or guaranteed under subchapter IV of this chapter and part C of subchapter I of chapter 34 of Title 42.

(8) Nonprofit

The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to

the benefit of any private shareholder or individual.

(9) School or department of divinity

The term "school or department of divinity" means an institution, or a department or a branch of an institution, the program of instruction of which is designed for the education of students--

(A) to prepare the students to become ministers of religion or to enter upon some other religious vocation (or to provide continuing training for any such vocation); or

(B) to prepare the students to teach theological subjects.

(10) Secondary school

The term "secondary school" has the same meaning given that term under section 7801 of this title.

(11) Secretary

The term "Secretary" means the Secretary of Education.

(12) Service-learning

The term "service-learning" has the same meaning given that term under section 12511(23) of Title 42.

(13) Special education teacher

The term "special education teacher" means teachers who teach children with disabilities as defined in section 1401 of this title.

(14) State educational agency

The term "State educational agency" has the same meaning given that term under section 7801 of this title.

(15) State higher education agency

The term "State higher education agency" means the officer or agency primarily responsible for the State supervision of higher education.

(16) State; Freely Associated States

(A) State

The term "State" includes, in addition to the several States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Freely Associated States.

(B) Freely Associated States

The term "Freely Associated States" means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

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**UNITED STATES CODE ANNOTATED
TITLE 20. EDUCATION
CHAPTER 28--HIGHER EDUCATION
RESOURCES AND STUDENT ASSISTANCE
SUBCHAPTER IV--STUDENT ASSISTANCE
PART F--GENERAL PROVISIONS RELATING TO
STUDENT ASSISTANCE PROGRAMS**

**→§ 1094. Program participation
agreements**

(a) Required for programs of assistance; contents

In order to be an eligible institution for the purposes of any program authorized under this subchapter and part C of subchapter I of chapter 34 of Title 42, an institution must be an institution of higher education or an eligible institution (as that term is defined for the purpose of that program) and shall, except with respect to a program under subpart 4 of part A of this subchapter, enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

(1) The institution will use funds received by it for any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 and any interest or other earnings thereon solely for the purpose specified in and in accordance with the provision of that program.

(2) The institution shall not charge any student a fee for processing or handling any application, form, or data required to determine the student's eligibility for assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42 or the amount of such assistance.

(3) The institution will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under this subchapter and part C of subchapter I of chapter 34 of Title 42, together with assurances that the institution will provide, upon request and in a timely fashion, information relating to the administrative capability and financial responsibility of the institution to--

(A) the Secretary;

(B) the appropriate guaranty agency; and

(C) the appropriate accrediting agency or association;

(4) The institution will comply with the provisions of subsection (c) of this section and the regulations prescribed under that subsection, relating to fiscal eligibility.

(5) The institution will submit reports to the Secretary and, in the case of an institution participating in a program under part B or part D of this subchapter, to holders of loans made to the

institution's students under such parts at such times and containing such information as the Secretary may reasonably require to carry out the purpose of this subchapter and part C of subchapter I of chapter 34 of Title 42.

(6) The institution will not provide any student with any statement or certification to any lender under part B of this subchapter that qualifies the student for a loan or loans in excess of the amount that student is eligible to borrow in accordance with sections 1075(a), 1078(a)(2), and 1078(b)(1)(A) and (B) of this title.

(7) The institution will comply with the requirements of section 1092 of this title.

(8) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, the institution will make available to prospective students, at or before the time of application (A) the most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements, and (B) relevant State licensing requirements of the State in which such institution is located for any job for which the course of instruction is designed to prepare such prospective students.

(9) In the case of an institution participating in a program under part B or C of this subchapter, the institution will inform all eligible borrowers enrolled in the institution about the availability

and eligibility of such borrowers for State grant assistance from the State in which the institution is located, and will inform such borrowers from another State of the source for further information concerning such assistance from that State.

(10) The institution certifies that it has in operation a drug abuse prevention program that is determined by the institution to be accessible to any officer, employee, or student at the institution.

(11) In the case of any institution whose students receive financial assistance pursuant to section 1091(d) of this title, the institution will make available to such students a program proven successful in assisting students in obtaining a certificate of high school equivalency.

(12) The institution certifies that--

(A) the institution has established a campus security policy; and

(B) the institution has complied with the disclosure requirements of section 1092(f) of this title.

(13) The institution will not deny any form of Federal financial aid to any student who meets the eligibility requirements of this subchapter and part C of subchapter I of chapter 34 of Title 42 on the grounds that the student is participating in a program of study abroad approved for credit by the institution.

(14)(A) The institution, in order to participate as an eligible institution under part B or C of this subchapter, will develop a Default Management Plan for approval by the Secretary as part of its initial application for certification as an eligible institution and will implement such Plan for two years thereafter.

(B) Any institution of higher education which changes ownership and any eligible institution which changes its status as a parent or subordinate institution shall, in order to participate as an eligible institution under part B or C of this subchapter, develop a Default Management Plan for approval by the Secretary and implement such Plan for two years after its change of ownership or status.

(C) This paragraph shall not apply in the case of an institution in which (i) neither the parent nor the subordinate institution has a cohort default rate in excess of 10 percent, and (ii) the new owner of such parent or subordinate institution does not, and has not, owned any other institution with a cohort default rate in excess of 10 percent.

(15) The institution acknowledges the authority of the Secretary, guaranty agencies, lenders, accrediting agencies, the Secretary of Veterans Affairs, and the State agencies under subpart 1 of part G of this subchapter [20 U.S.C.A. § 1099a et seq.] to share with each other any information pertaining to the institution's eligibility to participate in programs under this subchapter and part C of subchapter I of chapter 34 of Title 42 [42

U.S.C.A. § 2751 et seq.] or any information on fraud and abuse.

(16)(A) The institution will not knowingly employ an individual in a capacity that involves the administration of programs under this subchapter and part C of subchapter I of chapter 34 of Title 42, or the receipt of program funds under this subchapter and part C of subchapter I of chapter 34 of Title 42, who has been convicted of, or has pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of funds under this subchapter and part C of subchapter I of chapter 34 of Title 42, or has been judicially determined to have committed fraud involving funds under this subchapter and part C of subchapter I of chapter 34 of Title 42 or contract with an institution or third party servicer that has been terminated under section 1082 of this title involving the acquisition, use, or expenditure of funds under this subchapter and part C of subchapter I of chapter 34 of Title 42, or who has been judicially determined to have committed fraud involving funds under this subchapter and part C of subchapter I of chapter 34 of Title 42.

(B) The institution will not knowingly contract with or employ any individual, agency, or organization that has been, or whose officers or employees have been--

(i) convicted of, or pled nolo contendere or guilty to, a crime involving the acquisition, use,

or expenditure of funds under this subchapter and part C of subchapter I of chapter 34 of Title 42; or

(ii) judicially determined to have committed fraud involving funds under this subchapter and part C of subchapter I of chapter 34 of Title 42.

(17) The institution will complete surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal postsecondary institution data collection effort, as designated by the Secretary, in a timely manner and to the satisfaction of the Secretary.

(18) The institution will meet the requirements established pursuant to section 1092(g) of this title.

(19) The institution will not impose any penalty, including the assessment of late fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that the student borrow additional funds, on any student because of the student's inability to meet his or her financial obligations to the institution as a result of the delayed disbursement of the proceeds of a loan made under this subchapter and part C of subchapter I of chapter 34 of Title 42 due to compliance with the provisions of this subchapter and part C of subchapter I of chapter 34 of Title 42, or delays attributable to the institution.

(20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

(21) The institution will meet the requirements established by the Secretary and accrediting agencies or associations, and will provide evidence to the Secretary that the institution has the authority to operate within a State.

(22) The institution will comply with the refund policy established pursuant to section 1091b of this title.

(23)(A) The institution, if located in a State to which section 1973gg-2(b) of Title 42 does not apply, will make a good faith effort to distribute a mail voter registration form, requested and received from the State, to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make such forms widely available to students at the institution

(B) The institution shall request the forms from the State 120 days prior to the deadline for registering to vote within the State. If an

institution has not received a sufficient quantity of forms to fulfill this section from the State within 60 days prior to the deadline for registering to vote in the State, the institution shall not be held liable for not meeting the requirements of this section during that election year.

(C) This paragraph shall apply to general and special elections for Federal office, as defined in section 431(3) of Title 2, and to the elections for Governor or other chief executive within such State).

(b) Hearings

(1) An institution that has received written notice of a final audit or program review determination and that desires to have such determination reviewed by the Secretary shall submit to the Secretary a written request for review not later than 45 days after receipt of notification of the final audit or program review determination.

(2) The Secretary shall, upon receipt of written notice under paragraph (1), arrange for a hearing and notify the institution within 30 days of receipt of such notice the date, time, and place of such hearing. Such hearing shall take place not later than 120 days from the date upon which the Secretary notifies the institution.

(c) Audits; financial responsibility; enforcement of standards

(1) Notwithstanding any other provisions of this subchapter and part C of subchapter I of chapter 34 of Title 42, the Secretary shall to prescribe such regulations as may be necessary to provide for--

(A)(i) except as provided in clauses (ii) and (iii), a financial audit of an eligible institution with regard to the financial condition of the institution in its entirety, and a compliance audit of such institution with regard to any funds obtained by it under this subchapter and part C of subchapter I of chapter 34 of Title 42 or obtained from a student or a parent who has a loan insured or guaranteed by the Secretary under this subchapter and part C of subchapter I of chapter 34 of Title 42, on at least an annual basis and covering the period since the most recent audit, conducted by a qualified, independent organization or person in accordance with standards established by the Comptroller General for the audit of governmental organizations, programs, and functions, and as prescribed in regulations of the Secretary, the results of which shall be submitted to the Secretary and shall be available to cognizant guaranty agencies, eligible lenders, State agencies, and the appropriate State agency notifying the Secretary under subpart 1 of part G of this subchapter;

(ii) with regard to an eligible institution which is audited under chapter 75 of Title 31, deeming such audit to satisfy the requirements of clause (i) for the period covered by such audit; or

(iii) at the discretion of the Secretary, with regard to an eligible institution (other than an eligible institution described in section 1002(a)(1)(C) of this title) that has obtained less than \$200,000 in funds under this subchapter and part C of subchapter I of chapter 34 of Title 42 during each of the 2 award years that precede the audit period and submits a letter of credit payable to the Secretary equal to not less than 1/2 of the annual potential liabilities of such institution as determined by the Secretary, deeming an audit conducted every 3 years to satisfy the requirements of clause (i), except for the award year immediately preceding renewal of the institution's eligibility under section 1099c(g) of this title;

(B) in matters not governed by specific program provisions, the establishment of reasonable standards of financial responsibility and appropriate institutional capability for the administration by an eligible institution of a program of student financial aid under this subchapter and part C of subchapter I of chapter 34 of Title 42, including any matter the Secretary deems necessary to the sound administration of the financial aid programs, such as the pertinent actions of any owner, shareholder, or person exercising control over an eligible institution;

(C)(i) except as provided in clause (ii), a compliance audit of a third party servicer (other than with respect to the servicer's functions as a lender if such functions are otherwise audited under this part and such audits meet the

requirements of this clause), with regard to any contract with an eligible institution, guaranty agency, or lender for administering or servicing any aspect of the student assistance programs under this subchapter and part C of subchapter I of chapter 34 of Title 42, at least once every year and covering the period since the most recent audit, conducted by a qualified, independent organization or person in accordance with standards established by the Comptroller General for the audit of governmental organizations, programs, and functions, and as prescribed in regulations of the Secretary, the results of which shall be submitted to the Secretary; or

(ii) with regard to a third party servicer that is audited under chapter 75 of Title 31, such audit shall be deemed to satisfy the requirements of clause (i) for the period covered by such audit;

(D)(i) a compliance audit of a secondary market with regard to its transactions involving, and its servicing and collection of, loans made under this subchapter and part C of subchapter I of chapter 34 of Title 42, at least once a year and covering the period since the most recent audit, conducted by a qualified, independent organization or person in accordance with standards established by the Comptroller General for the audit of governmental organizations, programs, and functions, and as prescribed in regulations of the Secretary, the results of which shall be submitted to the Secretary; or

(ii) with regard to a secondary market that is audited under chapter 75 of Title 31, such audit shall be deemed to satisfy the requirements of clause (i) for the period covered by the audit;

(E) the establishment, by each eligible institution under part B of this subchapter responsible for furnishing to the lender the statement required by section 1078(a)(2)(A)(i) of this title, of policies and procedures by which the latest known address and enrollment status of any student who has had a loan insured under this part and who has either formally terminated his enrollment, or failed to re-enroll on at least a half-time basis, at such institution, shall be furnished either to the holder (or if unknown, the insurer) of the note, not later than 60 days after such termination or failure to re-enroll;

(F) the limitation, suspension, or termination of the participation in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 of an eligible institution, or the imposition of a civil penalty under paragraph (2)(B) whenever the Secretary has determined, after reasonable notice and opportunity for hearing, that such institution has violated or failed to carry out any provision of this subchapter and part C of subchapter I of chapter 34 of Title 42, any regulation prescribed under this subchapter and part C of subchapter I of chapter 34 of Title 42, or any applicable special arrangement, agreement, or limitation, except that no period of suspension under this section shall exceed 60 days unless the institution and the Secretary agree to

an extension or unless limitation or termination proceedings are initiated by the Secretary within that period of time;

(G) an emergency action against an institution, under which the Secretary shall, effective on the date on which a notice and statement of the basis of the action is mailed to the institution (by registered mail, return receipt requested), withhold funds from the institution or its students and withdraw the institution's authority to obligate funds under any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, if the Secretary--

(i) receives information, determined by the Secretary to be reliable, that the institution is violating any provision of this subchapter and part C of subchapter I of chapter 34 of Title 42, any regulation prescribed under this subchapter and part C of subchapter I of chapter 34 of Title 42, or any applicable special arrangement, agreement, or limitation,

(ii) determines that immediate action is necessary to prevent misuse of Federal funds, and

(iii) determines that the likelihood of loss outweighs the importance of the procedures prescribed under subparagraph (D) for limitation, suspension, or termination,

except that an emergency action shall not exceed 30 days unless limitation, suspension, or

termination proceedings are initiated by the Secretary against the institution within that period of time, and except that the Secretary shall provide the institution an opportunity to show cause, if it so requests, that the emergency action is unwarranted;

(H) the limitation, suspension, or termination of the eligibility of a third party servicer to contract with any institution to administer any aspect of an institution's student assistance program under this subchapter and part C of subchapter I of chapter 34 of Title 42, or the imposition of a civil penalty under paragraph (2)(B), whenever the Secretary has determined, after reasonable notice and opportunity for a hearing, that such organization, acting on behalf of an institution, has violated or failed to carry out any provision of this subchapter and part C of subchapter I of chapter 34 of Title 42, any regulation prescribed under this subchapter and part C of subchapter I of chapter 34 of Title 42, or any applicable special arrangement, agreement, or limitation, except that no period of suspension under this subparagraph shall exceed 60 days unless the organization and the Secretary agree to an extension, or unless limitation or termination proceedings are initiated by the Secretary against the individual or organization within that period of time; and

(I) an emergency action against a third party servicer that has contracted with an institution to administer any aspect of the institution's student assistance program under this subchapter and part C of subchapter I of chapter 34 of Title 42,

under which the Secretary shall, effective on the date on which a notice and statement of the basis of the action is mailed to such individual or organization (by registered mail, return receipt requested), withhold funds from the individual or organization and withdraw the individual or organization's authority to act on behalf of an institution under any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, if the Secretary--

(i) receives information, determined by the Secretary to be reliable, that the individual or organization, acting on behalf of an institution, is violating any provision of this subchapter and part C of subchapter I of chapter 34 of Title 42, any regulation prescribed under this subchapter and part C of subchapter I of chapter 34 of Title 42, or any applicable special arrangement, agreement, or limitation,

(ii) determines that immediate action is necessary to prevent misuse of Federal funds, and

(iii) determines that the likelihood of loss outweighs the importance of the procedures prescribed under subparagraph (F), for limitation, suspension, or termination,

except that an emergency action shall not exceed 30 days unless the limitation, suspension, or termination proceedings are initiated by the Secretary against the individual or organization within that period of

time, and except that the Secretary shall provide the individual or organization an opportunity to show cause, if it so requests, that the emergency action is unwarranted.

(2) If an individual who, or entity that, exercises substantial control, as determined by the Secretary in accordance with the definition of substantial control in subpart 3 of part G of this subchapter, over one or more institutions participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, or, for purposes of paragraphs (1)(H) and (I), over one or more organizations that contract with an institution to administer any aspect of the institution's student assistance program under this subchapter and part C of subchapter I of chapter 34 of Title 42, is determined to have committed one or more violations of the requirements of any program under this subchapter and part C of subchapter I of chapter 34 of Title 42, or has been suspended or debarred in accordance with the regulations of the Secretary, the Secretary may use such determination, suspension, or debarment as the basis for imposing an emergency action on, or limiting, suspending, or terminating, in a single proceeding, the participation of any or all institutions under the substantial control of that individual or entity.

(3)(A) Upon determination, after reasonable notice and opportunity for a hearing, that an eligible institution has engaged in substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates, the Secretary may suspend or terminate the eligibility status for any or all programs

under this subchapter and part C of subchapter I of chapter 34 of Title 42 of any otherwise eligible institution, in accordance with procedures specified in paragraph (1)(D) of this subsection, until the Secretary finds that such practices have been corrected.

(B)(i) Upon determination, after reasonable notice and opportunity for a hearing, that an eligible institution--

(I) has violated or failed to carry out any provision of this subchapter and part C of subchapter I of chapter 34 of Title 42 or any regulation prescribed under this subchapter and part C of subchapter I of chapter 34 of Title 42; or

(II) has engaged in substantial misrepresentation of the nature of its educational program, its financial charges, and the employability of its graduates,

the Secretary may impose a civil penalty upon such institution of not to exceed \$25,000 for each violation or misrepresentation.

(ii) Any civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of the penalty to the size of the institution of higher education subject to the determination, and the gravity of the violation, failure, or misrepresentation shall be considered. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be

deducted from any sums owing by the United States to the institution charged.

(4) The Secretary shall publish a list of State agencies which the Secretary determines to be reliable authority as to the quality of public postsecondary vocational education in their respective States for the purpose of determining eligibility for all Federal student assistance programs.

(5) The Secretary shall make readily available to appropriate guaranty agencies, eligible lenders, State agencies notifying the Secretary under subpart 1 of part G of this subchapter, and accrediting agencies or associations the results of the audits of eligible institutions conducted pursuant to paragraph (1)(A).

(6) The Secretary is authorized to provide any information collected as a result of audits conducted under this section, together with audit information collected by guaranty agencies, to any Federal or State agency having responsibilities with respect to student financial assistance, including those referred to in subsection (a)(15) of this section.

(7) Effective with respect to any audit conducted under this subsection after December 31, 1988, if, in the course of conducting any such audit, the personnel of the Department of Education discover, or are informed of, grants or other assistance provided by an institution in accordance with this subchapter and part C of subchapter I of chapter 34 of Title 42 for which the institution has not received funds appropriated under this subchapter and part C of subchapter I of chapter 34 of Title 42 (in the amount

necessary to provide such assistance), including funds for which reimbursement was not requested prior to such discovery or information, such institution shall be permitted to offset that amount against any sums determined to be owed by the institution pursuant to such audit, or to receive reimbursement for that amount (if the institution does not owe any such sums).

(d) "Eligible institution" defined

For the purpose of this section, the term "eligible institution" means any such institution described in section 1002 of this title.

(e) Construction

Nothing in the amendments made by the Higher Education Amendments of 1992 shall be construed to prohibit an institution from recording, at the cost of the institution, a hearing referred to in subsection (b)(2), subsection (c)(1)(D), or subparagraph (A) or (B)(i) of subsection (c)(2), of this section to create a record of the hearing, except the unavailability of a recording shall not serve to delay the completion of the proceeding. The Secretary shall allow the institution to use any reasonable means, including stenographers, of recording the hearing.

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TITLE 20. EDUCATION

CHAPTER 28--HIGHER EDUCATION

RESOURCES AND STUDENT ASSISTANCE

SUBCHAPTER IV--STUDENT ASSISTANCE

PART G--PROGRAM INTEGRITY

SUBPART 3--ELIGIBILITY AND CERTIFICATION

PROCEDURES

**→§ 1099c. Eligibility and certification
procedures**

(a) General requirement

For purposes of qualifying institutions of higher education for participation in programs under this subchapter and part C of subchapter I of chapter 34 of Title 42, the Secretary shall determine the legal authority to operate within a State, the accreditation status, and the administrative capability and financial responsibility of an institution of higher education in accordance with the requirements of this section.

(b) Single application form

The Secretary shall prepare and prescribe a single application form which--

- (1) requires sufficient information and documentation to determine that the requirements of eligibility, accreditation, financial responsibility, and administrative capability of the institution of higher education are met;**

(2) requires a specific description of the relationship between a main campus of an institution of higher education and all of its branches, including a description of the student aid processing that is performed by the main campus and that which is performed at its branches;

(3) requires--

(A) a description of the third party servicers of an institution of higher education; and

(B) the institution to maintain a copy of any contract with a financial aid service provider or loan servicer, and provide a copy of any such contract to the Secretary upon request;

(4) requires such other information as the Secretary determines will ensure compliance with the requirements of this subchapter and part C of subchapter I of chapter 34 of Title 42 with respect to eligibility, accreditation, administrative capability and financial responsibility; and

(5) provides, at the option of the institution, for participation in one or more of the programs under part B or C of this subchapter.

(c) Financial responsibility standards

(1) The Secretary shall determine whether an institution has the financial responsibility required by this subchapter and part C of subchapter I of chapter 34 of Title 42 on the basis of whether the institution is able--

(A) to provide the services described in its official publications and statements;

(B) to provide the administrative resources necessary to comply with the requirements of this subchapter and part C of subchapter I of chapter 34 of Title 42; and

(C) to meet all of its financial obligations, including (but not limited to) refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.

(2) Notwithstanding paragraph (1), if an institution fails to meet criteria prescribed by the Secretary regarding ratios that demonstrate financial responsibility, then the institution shall provide the Secretary with satisfactory evidence of its financial responsibility in accordance with paragraph (3). Such criteria shall take into account any differences in generally accepted accounting principles, and the financial statements required thereunder, that are applicable to for profit, public, and nonprofit institutions. The Secretary shall take into account an institution's total financial circumstances in making a determination of its ability to meet the standards herein required.

(3) The Secretary shall determine an institution to be financially responsible, notwithstanding the institution's failure to meet the criteria under paragraphs (1) and (2), if--

(A) such institution submits to the Secretary third-party financial guarantees that the Secretary determines are reasonable, such as performance bonds or letters of credit payable to the Secretary, which third-party financial guarantees shall equal not less than one-half of the annual potential liabilities of such institution to the Secretary for funds under this subchapter and part C of subchapter I of chapter 34 of Title 42, including loan obligations discharged pursuant to section 1087 of this title, and to students for refunds of institutional charges, including funds under this subchapter and part C of subchapter I of chapter 34 of Title 42;

(B) such institution has its liabilities backed by the full faith and credit of a State, or its equivalent;

(C) such institution establishes to the satisfaction of the Secretary, with the support of a financial statement audited by an independent certified public accountant in accordance with generally accepted auditing standards, that the institution has sufficient resources to ensure against the precipitous closure of the institution, including the ability to meet all of its financial obligations (including refunds of institutional charges and repayments to the Secretary for liabilities and

debts incurred in programs administered by the Secretary); or

(D) such institution has met standards of financial responsibility, prescribed by the Secretary by regulation, that indicate a level of financial strength not less than those required in paragraph (2).

(4) If an institution of higher education that provides a 2-year or 4-year program of instruction for which the institution awards an associate or baccalaureate degree fails to meet the criteria imposed by the Secretary pursuant to paragraph (2), the Secretary shall waive that particular requirement for that institution if the institution demonstrates to the satisfaction of the Secretary that--

(A) there is no reasonable doubt as to its continued solvency and ability to deliver quality educational services;

(B) it is current in its payment of all current liabilities, including student refunds, repayments to the Secretary, payroll, and payment of trade creditors and withholding taxes; and

(C) it has substantial equity in school-occupied facilities, the acquisition of which was the direct cause of its failure to meet the criteria.

(5) The determination as to whether an institution has met the standards of financial responsibility provided for in paragraphs (2) and (3)(C) shall be based on an audited and certified financial statement

of the institution. Such audit shall be conducted by a qualified independent organization or person in accordance with standards established by the American Institute of Certified Public Accountants. Such statement shall be submitted to the Secretary at the time such institution is considered for certification or recertification under this section. If the institution is permitted to be certified (provisionally or otherwise) and such audit does not establish compliance with paragraph (2), the Secretary may require that additional audits be submitted.

(6)(A) The Secretary shall establish requirements for the maintenance by an institution of higher education of sufficient cash reserves to ensure repayment of any required refunds.

(B) The Secretary shall provide for a process under which the Secretary shall exempt an institution of higher education from the requirements described in subparagraph (A) if the Secretary determines that the institution--

(i) is located in a State that has a tuition recovery fund that ensures that the institution meets the requirements of subparagraph (A);

(ii) contributes to the fund; and

(iii) otherwise has legal authority to operate within the State.

(d) Administrative capacity standard

The Secretary is authorized--

(1) to establish procedures and requirements relating to the administrative capacities of institutions of higher education, including--

(A) consideration of past performance of institutions or persons in control of such institutions with respect to student aid programs; and

(B) maintenance of records;

(2) to establish such other reasonable procedures as the Secretary determines will contribute to ensuring that the institution of higher education will comply with administrative capability required by this subchapter and part C of subchapter I of chapter 34 of Title 42.

(e) Financial guarantees from owners

(1) Notwithstanding any other provision of law, the Secretary may, to the extent necessary to protect the financial interest of the United States, require--

(A) financial guarantees from an institution participating, or seeking to participate, in a program under this subchapter and part C of subchapter I of chapter 34 of Title 42, or from one or more individuals who the Secretary determines, in accordance with paragraph (2), exercise substantial control over such institution, or both, in an amount determined by the Secretary to be sufficient to satisfy the institution's potential liability to the Federal Government, student assistance recipients, and other program

participants for funds under this subchapter and part C of subchapter I of chapter 34 of Title 42; and

(B) the assumption of personal liability, by one or more individuals who exercise substantial control over such institution, as determined by the Secretary in accordance with paragraph (2), for financial losses to the Federal Government, student assistance recipients, and other program participants for funds under this subchapter and part C of subchapter I of chapter 34 of Title 42, and civil and criminal monetary penalties authorized under this subchapter and part C of subchapter I of chapter 34 of Title 42.

(2)(A) The Secretary may determine that an individual exercises substantial control over one or more institutions participating in a program under this subchapter and part C of subchapter I of chapter 34 of Title 42 if the Secretary determines that--

(i) the individual directly or indirectly controls a substantial ownership interest in the institution;

(ii) the individual, either alone or together with other individuals, represents, under a voting trust, power of attorney, proxy, or similar agreement, one or more persons who have, individually or in combination with the other persons represented or the individual representing them, a substantial ownership interest in the institution; or

(iii) the individual is a member of the board of directors, the chief executive officer, or other executive officer of the institution or of an entity that holds a substantial ownership interest in the institution.

(B) The Secretary may determine that an entity exercises substantial control over one or more institutions participating in a program under this subchapter and part C of subchapter I of chapter 34 of Title 42 if the Secretary determines that the entity directly or indirectly holds a substantial ownership interest in the institution.

(3) For purposes of this subsection, an ownership interest is defined as a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of the operation of, an institution or institution's parent corporation. An ownership interest may include, but is not limited to--

(A) a sole proprietorship;

(B) an interest as a tenant-in-common, joint tenant, or tenant by the entirety;

(C) a partnership; or

(D) an interest in a trust.

(4) The Secretary shall not impose the requirements described in subparagraphs (A) and (B) of paragraph (1) on an institution that--

(A) has not been subjected to a limitation, suspension, or termination action by the Secretary or a guaranty agency within the preceding 5 years;
 (B) has not had, during its 2 most recent audits of the institutions conduct of programs under this subchapter and part C of subchapter I of chapter 34 of Title 42, an audit finding that resulted in the institution being required to repay an amount greater than 5 percent of the funds the institution received from programs under this subchapter and part C of subchapter I of chapter 34 of Title 42 for any year;

(C) meets and has met, for the preceding 5 years, the financial responsibility standards under subsection (c) of this section; and

(D) has not been cited during the preceding 5 years for failure to submit audits required under this subchapter and part C of subchapter I of chapter 34 of Title 42 in a timely fashion.

(5) For purposes of section 1094(c)(1)(G) of this title, this section shall also apply to individuals or organizations that contract with an institution to administer any aspect of an institution's student assistance program under this subchapter and part C of subchapter I of chapter 34 of Title 42.

(6) Notwithstanding any other provision of law, any individual who--

(A) the Secretary determines, in accordance with paragraph (2), exercises substantial control over an institution participating in, or seeking to

participate in, a program under this subchapter and part C of subchapter I of chapter 34 of Title 42;

(B) is required to pay, on behalf of a student or borrower, a refund of unearned institutional charges to a lender, or to the Secretary; and

(C) willfully fails to pay such refund or willfully attempts in any manner to evade payment of such refund,

shall, in addition to other penalties provided by law, be liable to the Secretary for the amount of the refund not paid, to the same extent with respect to such refund that such an individual would be liable as a responsible person for a penalty under section 6672(a) of Title 26 with respect to the nonpayment of taxes.

(f) Actions on applications and site visits

The Secretary shall ensure that prompt action is taken by the Department on any application required under subsection (b) of this section. The personnel of the Department of Education may conduct a site visit at each institution before certifying or recertifying its eligibility for purposes of any program under this subchapter and part C of subchapter I of chapter 34 of Title 42. The Secretary shall establish priorities by which institutions are to receive site visits, and shall, to the extent practicable, coordinate such visits with site visits by States, guaranty agencies, and accrediting bodies in order to eliminate duplication, and reduce administrative burden.

(g) Time limitations on, and renewal of, eligibility

(1) General rule

After the expiration of the certification of any institution under the schedule prescribed under this section (as this section was in effect prior to October 7, 1998), or upon request for initial certification from an institution not previously certified, the Secretary may certify the eligibility for the purposes of any program authorized under this subchapter and part C of subchapter I of chapter 34 of Title 42 of each such institution for a period not to exceed 6 years.

(2) Notification

The Secretary shall notify each institution of higher education not later than 6 months prior to the date of the expiration of the institution's certification.

(3) Institutions outside the United States

The Secretary shall promulgate regulations regarding the recertification requirements applicable to an institution of higher education outside of the United States that meets the requirements of section 1002(a)(1)(C) of this title and received less than \$500,000 in funds under part B of this subchapter for the most recent year for which data are available.

(h) Provisional certification of institutional eligibility

(1) Notwithstanding subsections (d) and (g) of this section, the Secretary may provisionally certify an institution's eligibility to participate in programs under this subchapter and part C of subchapter I of chapter 34 of Title 42--

(A) for not more than one complete award year in the case of an institution of higher education seeking an initial certification; and

(B) for not more than 3 complete award years if--

(i) the institution's administrative capability and financial responsibility is being determined for the first time;

(ii) there is a complete or partial change of ownership, as defined under subsection (i) of this section, of an eligible institution; or

(iii) the Secretary determines that an institution that seeks to renew its certification is, in the judgment of the Secretary, in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities under a program participation agreement.

(2) Whenever the Secretary withdraws the recognition of any accrediting agency, an institution of higher education which meets the requirements of accreditation, eligibility, and certification on the day prior to such withdrawal, the Secretary may,

notwithstanding the withdrawal, continue the eligibility of the institution of higher education to participate in the programs authorized by this subchapter and part C of subchapter I of chapter 34 of Title 42 for a period not to exceed 18 months from the date of the withdrawal of recognition.

(3) If, prior to the end of a period of provisional certification under this subsection, the Secretary determines that the institution is unable to meet its responsibilities under its program participation agreement, the Secretary may terminate the institution's participation in programs under this subchapter and part C of subchapter I of chapter 34 of Title 42.

(i) Treatment of changes of ownership

(1) An eligible institution of higher education that has had a change in ownership resulting in a change of control shall not qualify to participate in programs under this subchapter and part C of subchapter I of chapter 34 of Title 42 after the change in control (except as provided in paragraph (3)) unless it establishes that it meets the requirements of section 1002 of this title (other than the requirements in subsections (b)(5) and (c)(3) [FN1]) and this section after such change in control.

(2) An action resulting in a change in control may include (but is not limited to)--

(A) the sale of the institution or the majority of its assets;

(B) the transfer of the controlling interest of stock of the institution or its parent corporation;

(C) the merger of two or more eligible institutions;

(D) the division of one or more institutions into two or more institutions;

(E) the transfer of the controlling interest of stock of the institutions to its parent corporation; or

(F) the transfer of the liabilities of the institution to its parent corporation.

(3) An action that may be treated as not resulting in a change in control includes (but is not limited to)--

(A) the sale or transfer, upon the death of an owner of an institution, of the ownership interest of the deceased in that institution to a family member or to a person holding an ownership interest in that institution; or

(B) another action determined by the Secretary to be a routine business practice.

(4)(A) The Secretary may provisionally certify an institution seeking approval of a change in ownership based on the preliminary review by the Secretary of a materially complete application that is received by the Secretary within 10 business days of the transaction for which the approval is sought.

(B) A provisional certification under this paragraph shall expire not later than the end of the month following the month in which the transaction

occurred, except that if the Secretary has not issued a decision on the application for the change of ownership within that period, the Secretary may continue such provisional certification on a month-to-month basis until such decision has been issued.

(j) Treatment of branches

(1) A branch of an eligible institution of higher education, as defined pursuant to regulations of the Secretary, shall be certified under this subpart before it may participate as part of such institution in a program under this subchapter and part C of subchapter I of chapter 34 of Title 42, except that such branch shall not be required to meet the requirements of sections 1002(b)(1)(E) and 1002(c)(1)(C) of this title prior to seeking such certification. Such branch is required to be in existence at least 2 years after the branch is certified by the Secretary as a branch campus participating in a program under this subchapter and part C of subchapter I of chapter 34 of Title 42, prior to seeking certification as a main campus or free-standing institution.

(2) The Secretary may waive the requirement of section 1001(a)(2) of this title for a branch that (A) is not located in a State, (B) is affiliated with an eligible institution, and (C) was participating in one or more programs under this subchapter and part C of subchapter I of chapter 34 of Title 42 on or before January 1, 1992.

[FN1] See References in Text under this section.

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Effective: [See Text Amendments]**UNITED STATES CODE ANNOTATED****TITLE 31. MONEY AND FINANCE****SUBTITLE III--FINANCIAL MANAGEMENT****CHAPTER 37--CLAIMS****SUBCHAPTER III--CLAIMS AGAINST THE UNITED STATES GOVERNMENT****→§ 3729. False claims****(a) Liability for certain acts.--Any person who--**

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by

the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that-- [FN1]

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative

action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.--For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.--For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

[FN1] For updates to dollar amounts, see Code of Federal Regulations.

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3729	31:231	R.S. § 3490.

Current through P.L. 109-169 (excluding P.L. 109-162,109-163)approved 01-11-06

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Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED

TITLE 31. MONEY AND FINANCE

SUBTITLE III--FINANCIAL MANAGEMENT

CHAPTER 37--CLAIMS

SUBCHAPTER III--CLAIMS AGAINST THE UNITED STATES GOVERNMENT

→§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General.--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. [FN1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives

both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.--(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a

party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will

interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.--(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [FN2] Accounting Office report, hearing,

audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any

relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.--(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [FN3] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. -

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses.**--The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **Fees and expenses to prevailing defendant.**--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of

employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

[FN1] See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

[FN2] So in original. Probably should be "General".

[FN3] So in original. Probably should be "General".

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3730(a).....	31:233	R.S. § 3492.
3730(b)(1).....	31:232(A), (B) (less words between 3d	
		R.S. § 3491(A)-(E); restated Dec. 23,

	and 4th commas)	1943, ch. 377, § 1, 57 Stat. 608; June 11, Pub.L. 86-507, § 1(28), (29), 74 Stat. 202.
3730(b)(2).....	31:232(C) (1st- 3d sentences, 5th sentence proviso).	
3730(b)(3)	31:232(C) (4th sentence, 5th sentence less proviso).	
3730(b)(4)	31:232(C) (last sentence), (D)	
3730(c)(1).....	31:232(E)(1)	
3730(c)(2).....	31:232(E)(2) (less proviso)	
3730(d).....	31:232(B) (words between 3d and 4th commas), (E)(2) (proviso).	

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**CODE OF FEDERAL REGULATIONS
TITLE 34--EDUCATION
SUBTITLE B--REGULATIONS OF THE
OFFICES OF THE DEPARTMENT OF
EDUCATION
CHAPTER VI--OFFICE OF POSTSECONDARY
EDUCATION, DEPARTMENT OF EDUCATION
PART 600--INSTITUTIONAL ELIGIBILITY
UNDER THE HIGHER EDUCATION ACT OF
1965,
AS AMENDED
SUBPART A--GENERAL**

Current through December 28, 2005; 70 FR 76935

§ 600.1 Scope.

This part establishes the rules and procedures that the Secretary uses to determine whether an educational institution qualifies in whole or in part as an eligible institution of higher education under the Higher Education Act of 1965, as amended (HEA). An eligible institution of higher education may apply to participate in programs authorized by the HEA (HEA programs).

(Authority: 20 U.S.C. 1088, 1094, 1099b, 1099c,
and 1141)

<General Materials (GM) - References, Annotations,
or Tables>

34 C. F. R. § 600.1

34 CFR § 600.1

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**CODE OF FEDERAL REGULATIONS
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AS AMENDED
SUBPART A--GENERAL**

Current through December 28, 2005; 70 FR 76935

§ 600.2 Definitions.

The following definitions apply to terms used in this part:

Accredited: The status of public recognition that a nationally recognized accrediting agency grants to an institution or educational program that meets the agency's established requirements.

Award year: The period of time from July 1 of one year through June 30 of the following year.

Branch Campus: A location of an institution that is geographically apart and independent of the main campus of the institution. The Secretary considers a location of an institution to be independent of the main campus if the location--

- (1) Is permanent in nature;

(2) Offers courses in educational programs leading to a degree, certificate, or other recognized educational credential;

(3) Has its own faculty and administrative or supervisory organization; and

(4) Has its own budgetary and hiring authority.

Clock hour: A period of time consisting of--

(1) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;

(2) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period; or

(3) Sixty minutes of preparation in a correspondence course.

Correspondence course: (1) A "home study" course provided by an institution under which the institution provides instructional materials, including examinations on the materials, to students who are not physically attending classes at the institution. When students complete a portion of the instructional materials, the students take the examinations that relate to that portion of the materials, and return the examinations to the institution for grading.

(2) A home study course that provides instruction in whole or in part through the use of video cassettes or video discs in an award year is a correspondence

course unless the institution also delivers the instruction on the cassette or disc to students physically attending classes at the institution during the same award year.

(3) A course at an institution that may otherwise satisfy the definition of a "telecommunications course" is a correspondence course if the sum of telecommunications and other correspondence courses offered by that institution equals or exceeds 50 percent of the total courses offered at that institution.

(4) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

Educational program: A legally authorized postsecondary program of organized instruction or study that leads to an academic, professional, or vocational degree, or certificate, or other recognized educational credential. However, the Secretary does not consider that an institution provides an educational program if the institution does not provide instruction itself (including a course of independent study), but merely gives credit for one or more of the following: instruction provided by other institutions or schools; examinations provided by agencies or organizations; or other accomplishments such as "life experience."

Eligible institution: An institution that--

(1) Qualifies as--

(i) An institution of higher education, as defined in § 600.4;

(ii) A proprietary institution of higher education, as defined in § 600.5; or

(iii) A postsecondary vocational institution, as defined in § 600.6; and

(2) Meets all the other applicable provisions of this part.

Federal Family Education Loan (FFEL) Programs: The loan programs (formerly called the Guaranteed Student Loan (GSL) programs) authorized by title IV-B of the HEA, including the Federal Stafford Loan, Federal PLUS, Federal Supplemental Loans for Students (Federal SLS), and Federal Consolidation Loan programs, in which lenders use their own funds to make loans to enable students or their parents to pay the costs of the students' attendance at eligible institutions. The Federal Stafford Loan, Federal PLUS, Federal SLS, and Federal Consolidation Loan programs are defined in 34 CFR part 668.

Incarcerated student: A student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, or other similar correctional institution. A student is not considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only weekends.

Legally authorized: The legal status granted to an institution through a charter, license, or other written

document issued by the appropriate agency or official of the State in which the institution is physically located.

Nationally recognized accrediting agency: An agency or association that the Secretary recognizes as a reliable authority to determine the quality of education or training offered by an institution or a program offered by an institution. The Secretary recognizes these agencies and associations under the provisions of 34 CFR part 602 and publishes a list of the recognized agencies in the Federal Register.

Nonprofit institution: An institution that--

(1) Is owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

(2) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(3) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

One-academic-year training program: An educational program that is at least one academic year as defined under 34 CFR 668.2.

Preaccredited: A status that a nationally recognized accrediting agency, recognized by the

Secretary to grant that status, has accorded an unaccredited public or private nonprofit institution that is progressing toward accreditation within a reasonable period of time.

Recognized equivalent of a high school diploma:
The following are the equivalent of a high school diploma--

(1) A General Education Development Certificate (GED);

(2) A State certificate received by a student after the student has passed a State-authorized examination that the State recognizes as the equivalent of a high school diploma;

(3) An academic transcript of a student who has successfully completed at least a two-year program that is acceptable for full credit toward a bachelor's degree; or

(4) For a person who is seeking enrollment in an educational program that leads to at least an associate degree or its equivalent and who has not completed high school but who excelled academically in high school, documentation that the student excelled academically in high school and has met the formalized, written policies of the institution for admitting such students.

Recognized occupation: An occupation that is--

(1) Listed in an "occupational division" of the latest edition of the Dictionary of Occupational Titles, published by the U.S. Department of Labor; or

(2) Determined by the Secretary in consultation with the Secretary of Labor to be a recognized occupation.

Regular student: A person who is enrolled or accepted for enrollment at an institution for the purpose of obtaining a degree, certificate, or other recognized educational credential offered by that institution.

Secretary: The Secretary of the Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

State: A State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. The latter three are also known as the Freely Associated States.

Telecommunications course: A course offered in an award year principally through the use of television, audio, or computer transmission, including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, computer conferencing, or video cassettes or discs. The term does not include a course that is delivered using video cassettes or disc

recordings unless that course is delivered to students physically attending classes at an institution providing the course during the same award year. If the course does not qualify as a telecommunications course it is considered to be a correspondence course, as provided for in paragraph (c) of the definition of correspondence course in this section.

Title IV, HEA program: Any of the student financial assistance programs listed in 34 CFR 668.1(c).

(Authority: 20 U.S.C. 1071 et seq., 1078-2, 1088, 1099b, 1099c, and 1141 and 26 U.S.C. 501(c).)

[59 FR 32657, June 24, 1994; 63 FR 40622, July 29, 1998; 64 FR 58615, Oct. 29, 1999]

<General Materials (GM) - References, Annotations,
or Tables>

34 C. F. R. § 600.2

34 CFR § 600.2

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Current through December 28, 2005; 70 FR 76935

§ 600.3 [Reserved]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.3

34 CFR § 600.3

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Current through December 28, 2005; 70 FR 76935

§ 600.4 Institution of higher education.

(a) An institution of higher education is a public or private nonprofit educational institution that--

(1) Is in a State, or for purposes of the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, Federal Work-Study, and Federal TRIO programs may also be located in the Federated States of Micronesia or the Marshall Islands;

(2) Admits as regular students only persons who--

(i) Have a high school diploma;

(ii) Have the recognized equivalent of a high school diploma; or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is physically located;

(3) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located;

(4) Provides an educational program--

(i) For which it awards an associate, baccalaureate, graduate, or professional degree;

(ii) That is at least a two-academic-year program acceptable for full credit toward a baccalaureate degree; or

(iii) That is at least a one-academic-year training program that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation; and

(5) Is--

(i) Accredited or preaccredited; or

(ii) Approved by a State agency listed in the Federal Register in accordance with 34 CFR part 603, if the institution is a public postsecondary vocational educational institution that seeks to participate only in Federal student assistance programs.

(b) An institution is physically located in a State if it has a campus or other instructional site in that State.

(c) The Secretary does not recognize the accreditation or preaccreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration before initiating any other legal action.

(Authority: 20 U.S.C. 1094, 1099b, and 1141(a))

[64 FR 58615, Oct. 29, 1999]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.4

34 CFR § 600.4

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Current through December 28, 2005; 70 FR 76935

§ 600.5 Proprietary institution of higher education.

(a) A proprietary institution of higher education is an educational institution that--

(1) Is not a public or private nonprofit educational institution;

(2) Is in a State;

(3) Admits as regular students only persons who--

(i) Have a high school diploma;

(ii) Have the recognized equivalent of a high school diploma; or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is physically located;

(4) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located;

(5) Provides an eligible program of training, as defined in 34 CFR 668.8, to prepare students for gainful employment in a recognized occupation;

(6) Is accredited;

(7) Has been in existence for at least two years;
and

(8) Has no more than 90 percent of its revenues derived from title IV, HEA program funds, as determined under paragraph (d) of this section.

(b)(1) The Secretary considers an institution to have been in existence for two years only if--

(i) The institution has been legally authorized to provide, and has provided, a continuous educational program to prepare students for gainful employment in a recognized occupation during the 24 months preceding the date of its eligibility application; and

(ii) The educational program that the institution provides on the date of its eligibility application is substantially the same in length and subject matter as the program that the institution provided during the 24 months preceding the date of its eligibility application.

(2)(i) The Secretary considers an institution to have provided a continuous educational program

during the 24 months preceding the date of its eligibility application even if the institution did not provide that program during normal vacation periods, or periods when the institution temporarily closed due to a natural disaster that directly affected the institution or the institution's students.

(ii) The Secretary considers an institution to have satisfied the provisions of paragraph (b)(1)(ii) of this section if the institution substantially changed the subject matter of the educational program it provided during that 24-month period because of new technology or the requirements of other Federal agencies.

(3) In determining whether an applicant institution satisfies the requirement contained in paragraph (b)(1) of this section, the Secretary--

(i) Counts any period during which the applicant institution has been certified as a branch campus; and

(ii) Except as provided in paragraph (b)(3)(i) of this section, does not count any period during which the applicant institution was a part of another eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school.

(c) An institution is physically located in a State if it has a campus or other instructional site in that State.

(d)(1) An institution satisfies the requirement contained in paragraph (a)(8) of this section by examining its revenues under the following formula for its latest complete fiscal year:

Title IV, HEA program funds the institution used to satisfy its students' tuition, fees, and other institutional charges to students

The sum of revenues including title IV, HEA program funds generated by the institution from: tuition, fees, and other institutional charges for students enrolled in eligible programs as defined in 34 CFR 668.8; and activities conducted by the institution, to the extent not included in tuition, fees, and other institutional charges, that are necessary for the education or training of its students who are enrolled in those eligible programs.

(2) An institution must use the cash basis of accounting when calculating the amount of title IV, HEA program funds in the numerator and the total amount of revenue generated by the institution in the denominator of the fraction contained in paragraph (d)(1) of this section.

(3) Under the cash basis of accounting--

(i) In calculating the amount of revenue generated by the institution from institutional loans, the institution must include only the amount of loan repayments received by the institution during the fiscal year; and

(ii) In calculating the amount of revenue generated by the institution from institutional scholarships, the institution must include only the amount of funds it disbursed during the fiscal year from an established restricted account and only to the extent that the funds in that account represent designated funds from an outside source or income earned on those funds.

(e) With regard to the formula contained in paragraph(d)(1) of this section--

(1) The institution may not include as title IV, HEA program funds in the numerator nor as revenue generated by the institution in the denominator--

(i) The amount of funds it received under the Federal Work-Study (FWS) Program, unless the institution used those funds to pay a student's institutional charges in which case the FWS program funds used to pay those charges would be included in the numerator and denominator.

(ii) The amount of funds it received under the Leveraging Educational Assistance Partnership (LEAP) Program. (The LEAP Program was formerly called the State Student Incentive Grant or SSIG Program.);

(iii) The amount of institutional funds it used to match title IV, HEA program funds;

(iv) The amount of title IV, HEA program funds that must be refunded or returned under § 668.22; or

(v) The amount charged for books, supplies, and equipment unless the institution includes that amount as tuition, fees, or other institutional charges.

(2) In determining the amount of title IV, HEA program funds received by the institution under the cash basis of accounting, except as provided in paragraph (e)(3) of this section, the institution must presume that any title IV, HEA program funds disbursed or delivered to or on behalf of a student will be used to pay the student's tuition, fees, or other institutional charges, regardless of whether the institution credits those funds to the student's account or pays those funds directly to the student, and therefore must include those funds in the numerator and denominator.

(3) In paragraph (e)(2) of this section, the institution may not presume that title IV, HEA program funds were used to pay tuition, fees, and other institutional charges to the extent that those charges were satisfied by--

(i) Grant funds provided by non-Federal public agencies, or private sources independent of the institution;

(ii) Funds provided under a contractual arrangement described in § 600.7(d), or

(iii) Funds provided by State prepaid tuition plans.

(4) With regard to the denominator, revenue generated by the institution from activities it conducts, that are necessary for its students'

education or training, includes only revenue from those activities that--

(i) Are conducted on campus or at a facility under the control of the institution;

(ii) Are performed under the supervision of a member of the institution's faculty; and

(iii) Are required to be performed by all students in a specific educational program at the institution.

(f) An institution must notify the Secretary within 90 days following the end of the fiscal year used in paragraph (d)(1) of this section if it fails to satisfy the requirement contained in paragraph (a)(8) of this section.

(g) If an institution loses its eligibility because it failed to satisfy the requirement contained in paragraph (a)(8) of this section, to regain its eligibility it must demonstrate compliance with all eligibility requirements for at least the fiscal year following the fiscal year used in paragraph (d)(1) of this section.

(h) The Secretary does not recognize the accreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration before initiating any other legal action.

(Approved by the Office of Management and Budget under control number 1840- 0098)

(Authority: 20 U.S.C. 1088)

[59 FR 22337, April 29, 1994; 59 FR 32082, June 22, 1994; 59 FR 47801, Sept. 19, 1994; 59 FR 61177, Nov. 29, 1994; 61 FR 29901, June 12, 1996; 61 FR 60569, Nov. 29, 1996; 64 FR 58615, Oct. 29, 1999]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.5

34 CFR § 600.5

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Current through December 28, 2005; 70 FR 76935

§ 600.6 Postsecondary vocational institution.

(a) A postsecondary vocational institution is a public or private nonprofit educational institution that--

- (1) Is in a State;
- (2) Admits as regular students only persons who--
 - (i) Have a high school diploma;
 - (ii) Have the recognized equivalent of a high school diploma; or
 - (iii) Are beyond the age of compulsory school attendance in the State in which the institution is physically located;

(3) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located;

(4) Provides an eligible program of training, as defined in 34 CFR 668.8, to prepare students for gainful employment in a recognized occupation;

(5) Is--

(i) Accredited or preaccredited; or

(ii) Approved by a State agency listed in the Federal Register in accordance with 34 CFR part 603, if the institution is a public postsecondary vocational educational institution that seeks to participate only in Federal assistance programs; and

(6) Has been in existence for at least two years.

(b)(1) The Secretary considers an institution to have been in existence for two years only if--

(i) The institution has been legally authorized to provide, and has provided, a continuous education or training program to prepare students for gainful employment in a recognized occupation during the 24 months preceding the date of its eligibility application; and

(ii) The education or training program it provides on the date of its eligibility application is substantially the same in length and subject matter as the program it provided during the 24 months preceding the date of its eligibility application.

(2)(i) The Secretary considers an institution to have provided a continuous education or training program during the 24 months preceding the date of its eligibility application even if the institution did not provide that program during normal vacation periods, or periods when the institution temporarily closed due to a natural disaster that affected the institution or the institution's students.

(ii) The Secretary considers an institution to have satisfied the provisions of paragraph (b)(1)(ii) of this section if the institution substantially changed the subject matter of the educational program it provided during that 24-month period because of new technology or the requirements of other Federal agencies.

(3) In determining whether an applicant institution satisfies the requirement contained in paragraph (b)(1) of this section, the Secretary--

(i) Counts any period during which the applicant institution qualified as an eligible institution of higher education;

(ii) Counts any period during which the applicant institution was part of another eligible institution of higher education, provided that the applicant institution continues to be part of an eligible institution of higher education;

(iii) Counts any period during which the applicant institution has been certified as a branch campus; and

(iv) Except as provided in paragraph (b)(3)(iii) of this section, does not count any period during which the applicant institution was a part of another eligible proprietary institution of higher education or postsecondary vocational institution.

(c) An institution is physically located in a State or other instructional site if it has a campus or instructional site in that State.

(d) The Secretary does not recognize the accreditation or preaccreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration before initiating any other legal action.

(Authority: 20 U.S.C. 1088 and 1094(c)(3))

[64 FR 58616, Oct. 29, 1999]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.6

34 CFR § 600.6

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Current through December 28, 2005; 70 FR 76935

§ 600.7 Conditions of institutional ineligibility.

(a) General rule. For purposes of title IV of the HEA, an educational institution that otherwise satisfies the requirements contained in § § 600.4, 600.5, or 600.6 nevertheless does not qualify as an eligible institution under this part if--

(1) For its latest complete award year--

(i) More than 50 percent of the institution's courses were correspondence courses as calculated under paragraph (b) of this section;

(ii) Fifty percent or more of the institution's regular enrolled students were enrolled in correspondence courses;

(iii) More than twenty-five percent of the institution's regular enrolled students were incarcerated;

(iv) Fifty percent or more of its regular enrolled students had neither a high school diploma nor the recognized equivalent of a high school diploma, and the institution does not provide a four-year or two-year educational program for which it awards a bachelor's degree or an associate degree, respectively;

(2) The institution, or an affiliate of the institution that has the power, by contract or ownership interest, to direct or cause the direction of the management of policies of the institution--

(A) Files for relief in bankruptcy, or

(B) Has entered against it an order for relief in bankruptcy; or

(3) The institution, its owner, or its chief executive officer--

(i) Has pled guilty to, has pled nolo contendere to, or is found guilty of, a crime involving the acquisition, use, or expenditure of title IV, HEA program funds; or

(ii) Has been judicially determined to have committed fraud involving title IV, HEA program funds.

(b) Special provisions regarding correspondence courses and students--

(1) Treatment of telecommunications courses. For purposes of paragraphs (a)(1)(i) and (ii) of this section, the Secretary considers a telecommunications course to be a correspondence course if the sum of telecommunications courses and other correspondence courses the institution provided during that award year equaled or exceeded 50 percent of the total number of courses it provided during that year.

(2) Calculating the number of courses. For purposes of paragraphs (a)(1) (i) and (ii) of this section--

(i) A correspondence course may be a complete educational program offered by correspondence, or one course provided by correspondence in an on-campus (residential) educational program;

(ii) A course must be considered as being offered once during an award year regardless of the number of times it is offered during that year; and

(iii) A course that is offered both on campus and by correspondence must be considered two courses for the purpose of determining the total number of courses the institution provided during an award year.

(3) Exceptions.

(i) The provisions contained in paragraphs (a)(1)(i) and (ii) of this section do not apply to an institution that qualifies as a "technical institute or vocational school used exclusively or principally for the provision of vocational education to individuals who have

completed or left high school and who are available for study in preparation for entering the labor market" under section 521(4)(C) of the Carl D. Perkins Vocational and Applied Technology Education Act.

(ii) The Secretary waives the limitation contained in paragraph (a)(1)(ii) of this section for an institution that offers a 2-year associate-degree or a 4-year bachelor's-degree program if the students enrolled in the institution's correspondence courses receive no more than 5 percent of the title IV, HEA program funds received by students at that institution.

(c) Special provisions regarding incarcerated students--

(1) Exception. The Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section, upon the application of an institution, if the institution is a nonprofit institution that provides four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma.

(2) Waiver for entire institution. If the nonprofit institution that applies for a waiver consists solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary waives the prohibition contained in paragraph (a)(1)(iii) of this section for the entire institution.

(3) Other waivers. If the nonprofit institution that applies for a waiver does not consist solely of four-year or two-year educational programs for which it

awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary waives the prohibition contained in paragraph (a)(1)(iii) of this section--

(i) For the four-year and two-year programs for which it awards a bachelor's degree, an associate degree or a postsecondary diploma; and

(ii) For the other programs the institution provides, if the incarcerated regular students enrolled in those other programs have a completion rate of 50 percent or greater.

(d) Special provision for a nonprofit institution if more than 50 percent of its enrollment consists of students who do not have a high school diploma or its equivalent.

(1) Subject to the provisions contained in paragraphs (d)(2) and (d)(3) of this section, the Secretary waives the limitation contained in paragraph (a)(1)(iv) of this section for a nonprofit institution if that institution demonstrates to the Secretary's satisfaction that it exceeds that limitation because it serves, through contracts with Federal, State, or local government agencies, significant numbers of students who do not have a high school diploma or its recognized equivalent.

(2) Number of critical students. The Secretary grants a waiver under paragraph (d)(1) of this section only if no more than 40 percent of the institution's enrollment of regular students consists of students who--

(i) Do not have a high school diploma or its equivalent; and

(ii) Are not served through contracts described in paragraph (d)(3) of this section.

(3) Contracts with Federal, State, or local government agencies. For purposes of granting a waiver under paragraph (d)(1) of this section, the contracts referred to must be with Federal, State, or local government agencies for the purpose of providing job training to low-income individuals who are in need of that training. An example of such a contract is a job training contract under the Job Training Partnership Act (JPTA).

(e) Special provisions.

(1) For purposes of paragraph (a)(1) of this section, when counting regular students, the institution shall-

(i) Count each regular student without regard to the full-time or part-time nature of the student's attendance (i.e., "head count" rather than "full-time equivalent");

(ii) Count a regular student once regardless of the number of times the student enrolls during an award year; and

(iii) Determine the number of regular students who enrolled in the institution during the relevant award year by--

(A) Calculating the number of regular students who enrolled during that award year; and

(B) Excluding from the number of students in paragraph (e)(1)(iii)(A) of this section, the number of regular students who enrolled but subsequently withdrew or were expelled from the institution and were entitled to receive a 100 percent refund of their tuition and fees less any administrative fee that the institution is permitted to keep under its fair and equitable refund policy.

(2) For the purpose of calculating a completion rate under paragraph (c)(3)(ii) of this section, the institution shall--

(i) Determine the number of regular incarcerated students who enrolled in the other programs during the last completed award year;

(ii) Exclude from the number of regular incarcerated students determined in paragraph (e)(2)(i) of this section, the number of those students who enrolled but subsequently withdrew or were expelled from the institution and were entitled to receive a 100 percent refund of their tuition and fees, less any administrative fee the institution is permitted to keep under the institution's fair and equitable refund policy;

(iii) Exclude from the total obtained in paragraph (e)(2)(ii) of this section, the number of those regular incarcerated students who remained enrolled in the programs at the end of the applicable award year;

(iv) From the total obtained in paragraph (e)(2)(iii) of this section, determine the number of regular incarcerated students who received a degree, certificate, or other recognized educational credential awarded for successfully completing the program during the applicable award year; and

(v) Divide the total obtained in paragraph (e)(2)(iv) of this section by the total obtained in paragraph (e)(2)(iii) of this section and multiply by 100.

(f)(1) If the Secretary grants a waiver to an institution under this section, the waiver extends indefinitely provided that the institution satisfies the waiver requirements in each award year.

(2) If an institution fails to satisfy the waiver requirements for an award year, the institution becomes ineligible on June 30 of that award year.

(g)(1) For purposes of paragraph (a)(1) of this section, and any applicable waiver or exception under this section, the institution shall substantiate the required calculations by having the certified public accountant who prepares its audited financial statement under 34 CFR 668.15 or its title IV, HEA program compliance audit under 34 CFR 668.23 report on the accuracy of those determinations.

(2) The certified public accountant's report must be based on performing an "attestation engagement" in accordance with the American Institute of Certified Public Accountants (AICPA's) Statement on Standards for Attestation Engagements. The certified public accountant shall include that attestation report

with or as part of the audit report referenced in paragraph (g)(1) of this section.

(3) The certified public accountant's attestation report must indicate whether the institution's determinations regarding paragraph (a)(1) of this section and any relevant waiver or exception under paragraphs (b), (c), and (d) of this section are accurate; i.e., fairly presented in all material respects.

(h) Notice to the Secretary. An institution shall notify the Secretary--

(1) By July 31 following the end of an award year if it falls within one of the prohibitions contained in paragraph (a)(1) of this section, or fails to continue to satisfy a waiver or exception granted under this section; or

(2) Within 10 days if it falls within one of the prohibitions contained in paragraphs (a)(2) or (a)(3) of this section.

(i) Regaining eligibility.

(1) If an institution loses its eligibility because of one of the prohibitions contained in paragraph (a)(1) of this section, to regain its eligibility, it must demonstrate--

(i) Compliance with all eligibility requirements;

(ii) That it did not fall within any of the prohibitions contained in paragraph (a)(1) of this section for at least one award year; and

(iii) That it changed its administrative policies and practices to ensure that it will not fall within any of the prohibitions contained in paragraph (a)(1) of this section.

(2) If an institution loses its eligibility because of one of the prohibitions contained in paragraphs (a)(2) and (a)(3) of this section, this loss is permanent. The institution's eligibility cannot be reinstated.

(Approved by the Office of Management and Budget under control number 1840- 0098)

(Authority: 20 U.S.C. 1088)

[59 FR 22339, April 29, 1994; 59 FR 32082, June 22, 1994; 59 FR 47801, Sept. 19, 1994; 60 FR 34430, June 30, 1995; 64 FR 58616, Oct. 29, 1999]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.7

34 CFR § 600.7

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§ 600.8 Treatment of a branch campus.

A branch campus of an eligible proprietary institution of higher education or a postsecondary vocational institution must be in existence for at least two years as a branch campus after the branch is certified as a branch campus before seeking to be designated as a main campus or a free-standing institution.

(Authority: 20 U.S.C. 1099c)

[64 FR 58616, Oct. 29, 1999; 67 FR 67070, Nov. 1, 2002]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.8

34 CFR § 600.8

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§ 600.9 [Reserved]

[65 FR 65671, Nov. 1, 2000]

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34 C. F. R. § 600.9

34 CFR § 600.9

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Current through December 28, 2005; 70 FR 76935

§ 600.10 Date, extent, duration, and consequence of eligibility.

(a) Date of eligibility.

(1) If the Secretary determines that an applicant institution satisfies all the statutory and regulatory eligibility requirements, the Secretary considers the institution to be an eligible institution as of the date--

(i) The Secretary signs the institution's program participation agreement described in 34 CFR part 668, subpart B, for purposes of participating in any title IV, HEA program; and

(ii) The Secretary receives all the information necessary to make that determination for purposes other than participating in any title IV, HEA program.

(2) [Reserved]

(b) Extent of eligibility.

(1) If the Secretary determines that the entire applicant institution, including all its locations and all its educational programs, satisfies the applicable requirements of this part, the Secretary extends eligibility to all educational programs and locations identified on the institution's application for eligibility.

(2) If the Secretary determines that only certain educational programs or certain locations of an applicant institution satisfy the applicable requirements of this part, the Secretary extends eligibility only to those educational programs and locations that meet those requirements and identifies the eligible educational programs and locations in the eligibility notice sent to the institution under § 600.21.

(3) Eligibility does not extend to any location that an institution establishes after it receives its eligibility designation if the institution provides at least 50 percent of an educational program at that location, unless--

(i) The Secretary approves that location under § 600.20(e)(4); or

(ii) The location is licensed and accredited, the institution does not have to apply to the Secretary for approval of that location under § 600.20(c), and the

institution has reported to the Secretary that location under § 600.21.

(Approved by Office of Management and Budget under control number 1845-0098)

(c) Subsequent additions of educational programs.

(1) Except as provided in paragraph (c)(2) of this section, if an eligible institution adds an educational program after it has been designated as an eligible institution by the Secretary, the institution must apply to the Secretary to have that additional program designated as an eligible program of that institution.

(2) An eligible institution that adds an educational program after it has been designated as an eligible institution by the Secretary does not have to apply to the Secretary to have that additional program designated as an eligible program of that institution if the additional program--

(i) Leads to an associate, baccalaureate, professional, or graduate degree; or

(ii)(A) Prepares students for gainful employment in the same or related recognized occupation as an educational program that has previously been designated as an eligible program at that institution by the Secretary; and

(B) Is at least 8 semester hours, 12 quarter hours, or 600 clock hours.

(3) If an institution incorrectly determines under paragraph (c)(2) of this section that an educational program satisfies the applicable statutory and regulatory eligibility provisions without applying to the Secretary for approval, the institution is liable to repay to the Secretary all HEA program funds received by the institution for that educational program, and all the title IV, HEA program funds received by or on behalf of students who were enrolled in that educational program.

(d) Duration of eligibility.

(1) If an institution participates in the title IV, HEA programs, the Secretary's designation of the institution as an eligible institution under the title IV, HEA programs expires when the institution's program participation agreement, as described in 34 CFR part 668, subpart B, expires.

(2) If an institution participates in an HEA program other than a title IV, HEA program, the Secretary's designation of the institution as an eligible institution, for purposes of that non-title IV, HEA program, does not expire as long as the institution continues to satisfy the statutory and regulatory requirements governing its eligibility.

(e) Consequence of eligibility.

(1) If, as a part of its institutional eligibility application, an institution indicates that it wishes to participate in a title IV, HEA program and the Secretary determines that the institution satisfies the applicable statutory and regulatory requirements

governing institutional eligibility, the Secretary will determine whether the institution satisfies the standards of administrative capability and financial responsibility contained in 34 CFR part 668, subpart B.

(2) If, as part of its institutional eligibility application, an institution indicates that it does not wish to participate in any title IV, HEA program and the Secretary determines that the institution satisfies the applicable statutory and regulatory requirements governing institutional eligibility, the institution is eligible to apply to participate in any HEA program listed by the Secretary in the eligibility notice it receives under § 600.21. However, the institution is not eligible to participate in those programs, or receive funds under those programs, merely by virtue of its designation as an eligible institution under this part.

(Authority: 20 U.S.C. 1088 and 1141)

[59 FR 22341, April 29, 1994; 59 FR 47801, Sept. 19, 1994; 65 FR 65671, Nov. 1, 2000]

<General Materials (GM) - References, Annotations,
or Tables>

34 C. F. R. § 600.10

34 CFR § 600.10

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UNDER THE HIGHER EDUCATION ACT OF
1965,
AS AMENDED
SUBPART A--GENERAL**

Current through December 28, 2005; 70 FR 76935

§ 600.11 Special rules regarding institutional accreditation or preaccreditation.

(a) Change of accrediting agencies. For purposes of §§ 600.4(a)(5)(i), 600.5(a)(6), and 600.6(a)(5)(i), the Secretary does not recognize the accreditation or preaccreditation of an otherwise eligible institution if that institution is in the process of changing its accrediting agency, unless the institution provides to the Secretary--

(1) All materials related to its prior accreditation or preaccreditation; and

(2) Materials demonstrating reasonable cause for changing its accrediting agency.

(b) Multiple accreditation. The Secretary does not recognize the accreditation or preaccreditation of an otherwise eligible institution if that institution is

accredited or preaccredited as an institution by more than one accrediting agency, unless the institution--

(1) Provides to each such accrediting agency and the Secretary the reasons for that multiple accreditation or preaccreditation;

(2) Demonstrates to the Secretary reasonable cause for that multiple accreditation or preaccreditation; and

(3) Designates to the Secretary which agency's accreditation or preaccreditation the institution uses to establish its eligibility under this part.

(c) Loss of accreditation or preaccreditation.

(1) An institution may not be considered eligible for 24 months after it has had its accreditation or preaccreditation withdrawn, revoked, or otherwise terminated for cause, unless the accrediting agency that took that action rescinds that action.

(2) An institution may not be considered eligible for 24 months after it has withdrawn voluntarily from its accreditation or preaccreditation status under a show-cause or suspension order issued by an accrediting agency, unless that agency rescinds its order.

(d) Religious exception.

(1) If an otherwise eligible institution loses its accreditation or preaccreditation, the Secretary considers the institution to be accredited or

preaccredited for purposes of complying with the provisions of § § 600.4, 600.5, and 600.6 if the Secretary determines that its loss of accreditation or preaccreditation--

(i) Is related to the religious mission or affiliation of the institution; and

(ii) Is not related to its failure to satisfy the accrediting agency's standards.

(2) If the Secretary considers an unaccredited institution to be accredited or preaccredited under the provisions of paragraph (d)(1) of this section, the Secretary will consider that unaccredited institution to be accredited or preaccredited for a period sufficient to allow the institution to obtain alternative accreditation or preaccreditation, except that period may not exceed 18 months.

(Authority: 20 U.S.C. 1099b)

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.11

34 CFR § 600.11

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SUBPART B--PROCEDURES FOR
ESTABLISHING ELIGIBILITY**

Current through December 28, 2005; 70 FR 76935

§ 600.20 Application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

(a) Initial eligibility application. An institution that wishes to establish its eligibility to participate in any HEA program must submit an application to the Secretary for a determination that it qualifies as an eligible institution under this part. If the institution also wishes to be certified to participate in the title IV, HEA programs, it must indicate that intent on the application, and submit all the documentation indicated on the application to enable the Secretary to determine that it satisfies the relevant certification requirements contained in 34 CFR part 668, subparts B and L.

(b) Reapplication.

(1) A currently designated eligible institution that is not participating in the title IV, HEA programs must apply to the Secretary for a determination that the institution continues to meet the requirements in this part if the Secretary requests the institution to reapply. If the institution wishes to be certified to participate in the title IV, HEA programs, it must submit an application to the Secretary and must submit all the supporting documentation indicated on the application to enable the Secretary to determine that it satisfies the relevant certification requirements contained in subparts B and L of 34 CFR part 668.

(2) A currently designated eligible institution that participates in the title IV, HEA programs must apply to the Secretary for a determination that the institution continues to meet the requirements in this part and in 34 CFR part 668 if the institution wishes to--

(i) Continue to participate in the title IV, HEA programs beyond the scheduled expiration of the institution's current eligibility and certification designation;

(ii) Reestablish eligibility and certification as a private nonprofit, private for-profit, or public institution following a change in ownership that results in a change in control as described in § 600.31; or

(iii) Reestablish eligibility and certification after the institution changes its status as a proprietary, nonprofit, or public institution.

(c) Application to expand eligibility. A currently designated eligible institution that wishes to expand the scope of its eligibility and certification and disburse title IV, HEA Program funds to students enrolled in that expanded scope must apply to the Secretary and wait for approval to--

(1) Add a location at which the institution offers or will offer 50 percent or more of an educational program if one of the following conditions applies, otherwise it must report to the Secretary under § 600.21:

(i) The institution participates in the title IV, HEA programs under a provisional certification, as provided in 34 CFR 668.13.

(ii) The institution receives title IV, HEA program funds under the reimbursement or cash monitoring payment method, as provided in 34 CFR part 668, subpart K.

(iii) The institution acquires the assets of another institution that provided educational programs at that location during the preceding year and participated in the title IV, HEA programs during that year.

(iv) The institution would be subject to a loss of eligibility under 34 CFR 668.188 if it adds that location.

(v) The Secretary previously notified the institution that it must apply for approval of an additional location.

(2) Increase its level of program offering (e.g., adding graduate degree programs when it previously offered only baccalaureate degree programs);

(3) Add an educational program if the institution is required to apply to the Secretary for approval under § 600.10(c);

(4) Add a branch campus at a location that is not currently included in the institution's eligibility and certification designation; or

(5) Convert an eligible location to a branch campus.

(d) Application format. To satisfy the requirements of paragraphs (a), (b), and (c) of this section, an institution must apply in a format prescribed by the Secretary for that purpose and provide all the information and documentation requested by the Secretary to make a determination of its eligibility and certification.

(e) Secretary's response to applications.

(1) If the Secretary receives an application under paragraph (a) or (b)(1) of this section, the Secretary notifies the institution--

(i) Whether the applicant institution qualifies in whole or in part as an eligible institution under the appropriate provisions in §§ 600.4 through 600.7; and

(ii) Of the locations and educational programs that qualify as the eligible institution if only a portion of the applicant qualifies as an eligible institution;

(2) If the Secretary receives an application under paragraphs (a) or (b) of this section and that institution applies to participate in the title IV, HEA programs, the Secretary notifies the institution--

(i) Whether the institution is certified to participate in those programs;

(ii) Of the title IV, HEA programs in which it is eligible to participate;

(iii) Of the title IV, HEA programs in which it is eligible to apply for funds;

(iv) Of the effective date of its eligibility to participate in those programs; and

(v) Of the conditions under which it may participate in those programs;

(3) If the Secretary receives an application under paragraph (b)(2) of this section, the Secretary notifies the institution whether it continues to be certified, or whether it reestablished its eligibility and certification to participate in the title IV, HEA programs and the scope of such approval.

(4) If the Secretary receives an application under paragraph (c)(1) of this section for an additional location, the Secretary notifies the institution whether the location is eligible or ineligible to participate in

the title IV, HEA programs, and the date of eligibility if the location is determined eligible;

(5) If the Secretary receives an application under paragraph (c)(2) of this section for an increase in the level of program offering, or for an additional educational program under paragraph (c)(3) of this section, the Secretary notifies the institution whether the program qualifies as an eligible program, and if the program qualifies, the date of eligibility; and

(6) If the Secretary receives an application under paragraphs (c)(4) or (c)(5) of this section to have a branch campus certified to participate in the title IV, HEA programs as a branch campus, the Secretary notifies the institution whether that branch campus is certified to participate and the date that the branch campus is eligible to begin participation.

(f) Disbursement rules related to applications.

(1)(i) Except as provided under paragraph (f)(1)(ii) of this section and 34 CFR 668.26, if an institution submits an application under paragraph (b)(2)(i) of this section because its participation period is scheduled to expire, after that expiration date the institution may not disburse title IV, HEA program funds to students attending that institution until the institution receives the Secretary's notification that the institution is again eligible to participate in those programs.

(ii) An institution described in paragraph (f)(1)(i) of this section may disburse title IV, HEA program funds to its students if the institution submits to the

Secretary a materially complete renewal application in accordance with the provisions of 34 CFR 668.13(b)(2), and has not received a final decision from the Department on that application.

(2)(i) Except as provided under paragraph (f)(2)(ii) of this section and 34 CFR 668.26, if a private nonprofit, private for-profit, or public institution submits an application under paragraph (b)(2)(ii) or (b)(2)(iii) of this section because it has undergone or will undergo a change in ownership that results in a change of control or a change in status, the institution may not disburse title IV, HEA program funds to students attending that institution after the change of ownership or status until the institution receives the Secretary's notification that the institution is eligible to participate in those programs.

(ii) An institution described in paragraph (f)(2)(i) of this section may disburse title IV, HEA program funds to its students if the Secretary issues a provisional extension of certification under paragraph (g) of this section.

(3) If an institution must apply to the Secretary under paragraphs (c)(1) through (c)(4) of this section, the institution may not disburse title IV, HEA program funds to students attending the subject location, program, or branch until the institution receives the Secretary's notification that the location, program, or branch is eligible to participate in the title IV, HEA programs.

(4) If an institution applies to the Secretary under paragraph (c)(5) of this section to convert an eligible

location to a branch campus, the institution may continue to disburse title IV, HEA program funds to students attending that eligible location.

(5) If an institution does not apply to the Secretary to obtain the Secretary's approval of a new location, program, increased level of program offering, or branch, and the location, program, or branch does not qualify as an eligible location, program, or branch of that institution under this part and 34 CFR part 668, the institution is liable for all title IV, HEA program funds it disburses to students enrolled at that location or branch or in that program.

(g) Application for provisional extension of certification.

(1) If a private nonprofit institution, a private for-profit institution, or a public institution participating in the title IV, HEA programs undergoes a change in ownership that results in a change of control as described in 34 CFR 600.31, the Secretary may continue the institution's participation in those programs on a provisional basis, if the institution under the new ownership submits a "materially complete application" that is received by the Secretary no later than 10 business days after the day the change occurs.

(2) For purposes of this section, a private nonprofit institution, a private for-profit institution, or a public institution submits a materially complete application if it submits a fully completed application form designated by the Secretary supported by--

(i) A copy of the institution's State license or equivalent document that--as of the day before the change in ownership--authorized or will authorize the institution to provide a program of postsecondary education in the State in which it is physically located;

(ii) A copy of the document from the institution's accrediting association that--as of the day before the change in ownership--granted or will grant the institution accreditation status, including approval of any non-degree programs it offers;

(iii) Audited financial statements of the institution's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of 34 CFR 668.23; and

(iv) Audited financial statements of the institution's new owner's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of 34 CFR 668.23, or equivalent information for that owner that is acceptable to the Secretary.

(h) Terms of the extension.

(1) If the Secretary approves the institution's materially complete application, the Secretary provides the institution with a provisional Program Participation Agreement (PPA). The provisional PPA extends the terms and conditions of the program participation agreement that were in effect for the institution before its change of ownership.

(2) The provisional PPA expires on the earlier of--

(i) The date on which the Secretary signs a new program participation agreement;

(ii) The date on which the Secretary notifies the institution that its application is denied; or

(iii) The last day of the month following the month in which the change of ownership occurred, unless the provisions of paragraph (h)(3) of this section apply.

(3) If the provisional PPA will expire under the provisions of paragraph (h)(2)(iii) of this section, the Secretary extends the provisional PPA on a month-to-month basis after the expiration date described in paragraph (h)(2)(iii) of this section if, prior to that expiration date, the institution provides the Secretary with--

(i) A "same day" balance sheet showing the financial position of the institution, as of the date of the ownership change, that is prepared in accordance with Generally Accepted Accounting Principles (GAAP) published by the Financial Accounting Standards Board and audited in accordance with Generally Accepted Government Auditing Standards (GAGAS) published by the U.S. General Accounting Office;

(ii) If not already provided, approval of the change of ownership from the State in which the institution is located by the agency that authorizes the institution to legally provide postsecondary education in that State;

(iii) If not already provided, approval of the change of ownership from the institution's accrediting agency; and

(iv) A default management plan unless the institution is exempt from providing that plan under 34 CFR 668.14(b)(15).

(Approved by the Office of Management and Budget under control number 1845- 0098)

(Authority: 20 U.S.C. 1001, 1002, 1088, and 1099c)

[59 FR 22342, April 29, 1994; 59 FR 47801, Sept. 19, 1994; 64 FR 58616, Oct. 29, 1999; 65 FR 65671, Nov. 1, 2000]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.20

34 CFR § 600.20

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1965,
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SUBPART B--PROCEDURES FOR
ESTABLISHING ELIGIBILITY**

Current through December 28, 2005; 70 FR 76935

§ 600.21 Updating application information.

(a) Reporting requirements. Except as provided in paragraph (b) of this section, an eligible institution must report to the Secretary in a manner prescribed by the Secretary no later than 10 days after the change occurs, of any change in the following:

(1) Its name, the name of a branch, or the name of a previously reported location.

(2) Its address, the address of a branch, or the address of a previously reported location.

(3) Its establishment of an accredited and licensed additional location at which it offers or will offer 50 percent or more of an educational program if the institution wants to disburse title IV, HEA program

funds to students enrolled at that location, under the provisions in paragraph (d) of this section.

(4) The way it measures program length (e.g., from clock hours to credit hours, or from semester hours to quarter hours).

(5) A decrease in the level of program offering (e.g. the institution drops its graduate programs).

(6) A person's ability to affect substantially the actions of the institution if that person did not previously have this ability. The Secretary considers a person to have this ability if the person--

(i) Holds alone or together with another member or members of his or her family, at least a 25 percent "ownership interest" in the institution as defined in § 600.31(b);

(ii) Represents or holds, either alone or together with other persons, under a voting trust, power of attorney, proxy, or similar agreement at least a 25 percent "ownership interest" in the institution, as defined in § 600.31(b); or

(iii) Is a general partner, the chief executive officer, or chief financial officer of the institution.

(7) The individual the institution designates under 34 CFR 668.16(b)(1) as its title IV, HEA Program administrator.

(8) The closure of a branch campus or additional location that the institution was required to report to the Secretary.

(9) The governance of a public institution.

(b) Additional reporting from institutions owned by publicly-traded corporations. An institution that is owned by a publicly-traded corporation must report to the Secretary any change in the information described in paragraph (a)(6) of this section when it notifies its accrediting agency, but no later than 10 days after the institution learns of the change.

(c) Secretary's response to reporting. The Secretary notifies an institution if any reported changes affects the institution's eligibility, and the effective date of that change.

(d) Disbursement rules related to additional locations. When an institution must report to the Secretary about an additional location under paragraph (a)(3) of this section, the institution may not disburse title IV, HEA funds to students at that location before it reports to the Secretary about that location. Unless it is an institution that must apply to the Secretary under § 600.20(c)(1), once it reports to the Secretary about that location, the institution may disburse those funds to those students if that location is licensed and accredited.

(e) Consequence of failure to report. An institution's failure to inform the Secretary of a change described in paragraph (a) of this section within the time period

stated in that paragraph may result in adverse action against the institution.

(f) Definition. A family member includes a person's--

(1) Parent or stepparent, sibling or step-sibling, spouse, child or stepchild, or grandchild or step-grandchild;

(2) Spouse's parent or stepparent, sibling or step-sibling, child or stepchild, or grandchild or step-grandchild;

(3) Child's spouse; and

(4) Sibling's spouse.

(Approved by the Office of Management and Budget under control number 1845- 0012)

(Authority: 20 U.S.C. 1001, 1002, 1088, and 1099c)

[65 FR 65673, Nov. 1, 2000; 67 FR 67070, Nov. 1, 2002]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 600.21

34 CFR § 600.21

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PROVISIONS
SUBPART B--STANDARDS FOR
PARTICIPATION IN TITLE IV, HEA
PROGRAMS**

Current through December 28, 2005; 70 FR 76935

§ 668.13 Certification procedures.

(a) Requirements for certification.

(1) The Secretary certifies an institution to participate in the title IV, HEA programs if the institution qualifies as an eligible institution under 34 CFR part 600, meets the standards of this subpart and 34 CFR part 668, subpart L, and satisfies the requirements of paragraph (a)(2) of this section.

(2) Except as provided in paragraph (a)(3) of this section, if an institution wishes to participate for the first time in the title IV, HEA programs or has undergone a change in ownership that results in a change in control as described in 34 CFR 600.31, the institution must require the following individuals to complete title IV, HEA program training provided or approved by the Secretary no later than 12 months after the institution executes its program

participation agreement under § 668.14:

(i) The individual the institution designates under § 668.16(b)(1) as its title IV, HEA program administrator.

(ii) The institution's chief administrator or a high level institutional official the chief administrator designates.

(3)(i) An institution may request the Secretary to waive the training requirement for any individual described in paragraph (a)(2) of this section.

(ii) When the Secretary receives a waiver request under paragraph (a)(3)(i) of this section, the Secretary may grant or deny the waiver, require another institutional official to take the training, or require alternative training.

(b) Period of participation.

(1) If the Secretary certifies that an institution meets the standards of this subpart, the Secretary also specifies the period for which the institution may participate in a Title IV, HEA program. An institution's period of participation expires six years after the date that the Secretary certifies that the institution meets the standards of this subpart, except that the Secretary may specify a shorter period.

(2) Provided that an institution has submitted an application for a renewal of certification that is materially complete at least 90 days prior to the expiration of its current period of participation, the

institution's existing certification will be extended on a month to month basis following the expiration of the institution's period of participation until the end of the month in which the Secretary issues a decision on the application for recertification.

(c) Provisional certification.

(1) The Secretary may provisionally certify an institution if--

(i) The institution seeks initial participation in a Title IV, HEA program;

(ii) The institution is an eligible institution that has undergone a change in ownership that results in a change in control according to the provisions of 34 CFR part 600;

(iii) The institution is a participating institution--

(A) That is applying for a certification that the institution meets the standards of this subpart;

(B) That the Secretary determines has jeopardized its ability to perform its financial responsibilities by not meeting the factors of financial responsibility under § 668.15 or the standards of administrative capability under § 668.16; and

(C) Whose participation has been limited or suspended under subpart G of this part, or voluntarily enters into provisional certification;

(iv) The institution seeks a renewal of

participation in a Title IV, HEA program after the expiration of a prior period of participation in that program; or

(v) The institution is a participating institution that was accredited or preaccredited by a nationally recognized accrediting agency on the day before the Secretary withdrew the Secretary's recognition of that agency according to the provisions contained in 34 CFR part 603.

(2) If the Secretary provisionally certifies an institution, the Secretary also specifies the period for which the institution may participate in a Title IV, HEA program. Except as provided in paragraphs (c) (3) and (4) of this section, a provisionally certified institution's period of participation expires--

(i) Not later than the end of the first complete award year following the date on which the Secretary provisionally certified the institution under paragraph (c)(1)(i) of this section;

(ii) Not later than the end of the third complete award year following the date on which the Secretary provisionally certified the institution under paragraphs (c)(1)(ii), (iii), (iv) or (e)(2) of this section; and

(iii) If the Secretary provisionally certified the institution under paragraph (c)(1)(v) of this section, not later than 18 months after the date that the Secretary withdrew recognition from the institutions nationally recognized accrediting agency.

(3) Notwithstanding the maximum periods of participation provided for in paragraph (c)(2) of this section, if the Secretary provisionally certifies an institution, the Secretary may specify a shorter period of participation for that institution.

(4) For the purposes of this section, "provisional certification" means that the Secretary certifies that an institution has demonstrated to the Secretary's satisfaction that the institution--

(i) Is capable of meeting the standards of this subpart within a specified period; and

(ii) Is able to meet the institution's responsibilities under its program participation agreement, including compliance with any additional conditions specified in the institution's program participation agreement that the Secretary requires the institution to meet in order for the institution to participate under provisional certification.

(d) Revocation of provisional certification.

(1) If, before the expiration of a provisionally certified institution's period of participation in a Title IV, HEA program, the Secretary determines that the institution is unable to meet its responsibilities under its program participation agreement, the Secretary may revoke the institution's provisional certification for participation in that program.

(2)(i) If the Secretary revokes the provisional certification of an institution under paragraph (d)(1) of this section, the Secretary sends the institution a

notice by certified mail, return receipt requested. The Secretary also may transmit the notice by other, more expeditious means, if practical.

(ii) The revocation takes effect on the date that the Secretary mails the notice to the institution.

(iii) The notice states the basis for the revocation, the consequences of the revocation to the institution, and that the institution may request the Secretary to reconsider the revocation. The consequences of a revocation are described in § 668.26.

(3)(i) An institution may request reconsideration of a revocation under this section by submitting to the Secretary, within 20 days of the institution's receipt of the Secretary's notice, written evidence that the revocation is unwarranted. The institution must file the request with the Secretary by hand-delivery, mail, or facsimile transmission.

(ii) The filing date of the request is the date on which the request is--

(A) Hand-delivered;

(B) Mailed; or

(C) Sent by facsimile transmission.

(iii) Documents filed by facsimile transmission must be transmitted to the Secretary in accordance with instructions provided by the Secretary in the notice of revocation. An institution filing by facsimile transmission is responsible for confirming that a

complete and legible copy of the document was received by the Secretary.

(iv) The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(4)(i) The designated department official making the decision concerning an institution's request for reconsideration of a revocation is different from, and not subject to supervision by, the official who initiated the revocation of the institution's provisional certification. The deciding official promptly considers an institution's request for reconsideration of a revocation and notifies the institution, by certified mail, return receipt requested, of the final decision. The Secretary also may transmit the notice by other, more expeditious means, if practical.

(ii) If the Secretary determines that the revocation is warranted, the Secretary's notice informs the institution that the institution may apply for reinstatement of participation only after the later of the expiration of--

(A) Eighteen months after the effective date of the revocation; or

(B) A debarment or suspension of the institution under Executive Order (E.O.) 12549 (3 CFR, 1986 comp., p. 189) or the Federal Acquisition Regulations, 48 CFR part 9, subpart 9.4.

(iii) If the Secretary determines that the revocation of the institution's provisional certification is unwarranted, the Secretary's notice informs the

institution that the institution's provisional certification is reinstated, effective on the date that the Secretary's original revocation notice was mailed, for a specified period of time.

(5)(i) The mailing date of a notice of revocation or a request for reconsideration of a revocation is the date evidenced on the original receipt of mailing from the U.S. Postal Service.

(ii) The date on which a request for reconsideration of a revocation is submitted is--

(A) If the request was sent by a delivery service other than the U.S. Postal Service, the date evidenced on the original receipt by that service; and

(B) If the request was sent by facsimile transmission, the date that the document is recorded as received by facsimile equipment that receives the transmission.

(Approved by the Office of Management and Budget under control number 1845- 0537)

(Authority: 20 U.S.C. 1099c and E.O. 12549 (3 CFR, 1989 Comp., p. 189) and E.O. 12689 (3 CFR, 1989 Comp., p. 235))

[59 FR 22424, April 29, 1994; 59 FR 32657, June 24, 1994; 59 FR 34964, July 7, 1994; 60 FR 34431, June 30, 1995; 62 FR 62876, Nov. 25, 1997; 63 FR 40623, July 29, 1998; 64 FR 58617, Oct. 29, 1999; 65 FR 65675, Nov. 1, 2000]

<General Materials (GM) - References, Annotations,
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34 C. F. R. § 668.13

34 CFR § 668.13

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PARTICIPATION IN TITLE IV, HEA
PROGRAMS**

Current through December 28, 2005; 70 FR 76935

§ 668.14 Program participation agreement.

(a)(1) An institution may participate in any Title IV, HEA program, other than the LEAP and NEISP programs, only if the institution enters into a written program participation agreement with the Secretary, on a form approved by the Secretary. A program participation agreement conditions the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with the provisions of this part, the individual program regulations, and any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet.

(2) An institution's program participation agreement applies to each branch campus and other location of the institution that meets the applicable requirements of this part unless otherwise specified by the Secretary.

(b) By entering into a program participation agreement, an institution agrees that--

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;

(2) As a fiduciary responsible for administering Federal funds, if the institution is permitted to request funds under a Title IV, HEA program advance payment method, the institution will time its requests for funds under the program to meet the institution's immediate Title IV, HEA program needs;

(3) It will not request from or charge any student a fee for processing or handling any application, form, or data required to determine a student's eligibility for, and amount of, Title IV, HEA program assistance;

(4) It will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under the Title IV, HEA programs, together with assurances that the institution will provide, upon request and in a timely manner,

information relating to the administrative capability and financial responsibility of the institution to--

(i) The Secretary;

(ii) A guaranty agency, as defined in 34 CFR part 682, that guarantees loans made under the Federal Stafford Loan and Federal PLUS programs for attendance at the institution or any of the institution's branch campuses or other locations;

(iii) The nationally recognized accrediting agency that accredits or preaccredits the institution or any of the institution's branch campuses, other locations, or educational programs;

(iv) The State agency that legally authorizes the institution and any branch campus or other location of the institution to provide postsecondary education; and

(v) In the case of a public postsecondary vocational educational institution that is approved by a State agency recognized for the approval of public postsecondary vocational education, that State agency;

(5) It will comply with the provisions of § 668.15 relating to factors of financial responsibility;

(6) It will comply with the provisions of § 668.16 relating to standards of administrative capability;

(7) It will submit reports to the Secretary and, in the case of an institution participating in the Federal

Stafford Loan, Federal PLUS, or the Federal Perkins Loan Program, to holders of loans made to the institution's students under that program at such times and containing such information as the Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs;

(8) It will not provide any statement to any student or certification to any lender in the case of an FFEL Program loan, or origination record to the Secretary in the case of a Direct Loan Program loan that qualifies the student or parent for a loan or loans in excess of the amount that the student or parent is eligible to borrow in accordance with sections 425(a), 428(a)(2), 428(b)(1)(A) and (B), 428B, 428H, and 455(a) of the HEA;

(9) It will comply with the requirements of subpart D of this part concerning institutional and financial assistance information for students and prospective students;

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, it will make available to prospective students, at or before the time that those students apply for enrollment--

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for

which an educational program offered by the institution is designed to prepare those prospective students;

(11) In the case of an institution participating in the FFEL program, the institution will inform all eligible borrowers, as defined in 34 CFR part 682, enrolled in the institution about the availability and eligibility of those borrowers for State grant assistance from the State in which the institution is located, and will inform borrowers from another State of the source of further information concerning State grant assistance from that State;

(12) It will provide the certifications described in paragraph (c) of this section;

(13) In the case of an institution whose students receive financial assistance pursuant to section 484(d) of the HEA, the institution will make available to those students a program proven successful in assisting students in obtaining the recognized equivalent of a high school diploma;

(14) It will not deny any form of Federal financial aid to any eligible student solely on the grounds that the student is participating in a program of study abroad approved for credit by the institution;

(15)(i) Except as provided under paragraph (b)(15)(ii) of this section, the institution will use a default management plan approved by the Secretary with regard to its administration of the FFEL or Direct Loan programs, or both for at least the first two years of its participation in those programs, if the

institution--

(A) Is participating in the FFEL or Direct Loan programs for the first time; or

(B) Is an institution that has undergone a change of ownership that results in a change in control and is participating in the FFEL or Direct Loan programs.

(ii) The institution does not have to use an approved default management plan if--

(A) The institution, including its main campus and any branch campus, does not have a cohort default rate in excess of 10 percent; and

(B) The owner of the institution does not own and has not owned any other institution that had a cohort default rate in excess of 10 percent while that owner owned the institution.

(16) [Reserved]

(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, and State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title IV, HEA programs or any information on fraud and abuse;

(18) It will not knowingly--

(i) Employ in a capacity that involves the administration of the Title IV, HEA programs or the receipt of funds under those programs, an individual who has been convicted of, or has pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(ii) Contract with an institution or third-party servicer that has been terminated under section 432 of the HEA for a reason involving the acquisition, use, or expenditure of Federal, State, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; or

(iii) Contract with or employ any individual, agency, or organization that has been, or whose officers or employees have been--

(A) Convicted of, or pled nolo contendere or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(B) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government

funds;

(19) It will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal collection effort, as designated by the Secretary, regarding data on postsecondary institutions;

(20) In the case of an institution that is co-educational and has an intercollegiate athletic program, it will comply with the provisions of § 668.48;

(21) It will not impose any penalty, including, but not limited to, the assessment of late fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that the student borrow additional funds for which interest or other charges are assessed, on any student because of the student's inability to meet his or her financial obligations to the institution as a result of the delayed disbursement of the proceeds of a Title IV, HEA program loan due to compliance with statutory and regulatory requirements of or applicable to the Title IV, HEA programs, or delays attributable to the institution;

(22)(i) It will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the awarding of title IV, HEA program funds, except that this limitation does not apply to the recruitment of foreign students residing

in foreign countries who are not eligible to receive title IV, HEA program funds.

(ii) Activities and arrangements that an institution may carry out without violating the provisions of paragraph (b)(22)(i) of this section include, but are not limited to:

(A) The payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

(B) Compensation to recruiters based upon their recruitment of students who enroll only in programs that are not eligible for title IV, HEA program funds.

(C) Compensation to recruiters who arrange contracts between the institution and an employer under which the employer's employees enroll in the institution, and the employer pays, directly or by reimbursement, 50 percent or more of the tuition and fees charged to its employees; provided that the compensation is not based upon the number of employees who enroll in the institution, or the revenue they generate, and the recruiters have no contact with the employees.

(D) Compensation paid as part of a profit-sharing

or bonus plan, as long as those payments are substantially the same amount or the same percentage of salary or wages, and made to all or substantially all of the institution's full-time professional and administrative staff. Such payments can be limited to all, or substantially all of the full-time employees at one or more organizational level at the institution, except that an organizational level may not consist predominantly of recruiters, admissions staff, or financial aid staff.

(E) Compensation that is based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter. For this purpose, successful completion of an academic year means that the student has earned at least 24 semester or trimester credit hours or 36 quarter credit hours, or has successfully completed at least 900 clock hours of instruction at the institution.

(F) Compensation paid to employees who perform clerical "pre-enrollment" activities, such as answering telephone calls, referring inquiries, or distributing institutional materials.

(G) Compensation to managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting or admissions activities, or the awarding of title IV, HEA program funds.

(H) The awarding of token gifts to the institution's students or alumni, provided that the gifts are not in the form of money, no more than one gift is provided

annually to an individual, and the cost of the gift is not more than \$100.

(I) Profit distributions proportionately based upon an individual's ownership interest in the institution.

(J) Compensation paid for Internet-based recruitment and admission activities that provide information about the institution to prospective students, refer prospective students to the institution, or permit prospective students to apply for admission on-line.

(K) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, provided that none of the services involve recruiting or admission activities, or the awarding of title IV, HEA program funds.

(L) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, even if one of the services involves recruiting or admission activities or the awarding of title IV, HEA program funds, provided that the individuals performing the recruitment or admission activities, or the awarding of title IV, HEA program funds, are not compensated in a manner that would be impermissible under paragraph (b)(22) of this section.

(23) It will meet the requirements established pursuant to part H of Title IV of the HEA by the Secretary and nationally recognized accrediting agencies;

(24) It will comply with the requirements of § 668.22;

(25) It is liable for all--

(i) Improperly spent or unspent funds received under the Title IV, HEA programs, including any funds administered by a third-party servicer; and

(ii) Returns of title IV, HEA program funds that the institution or its servicer may be required to make; and

(26) If the stated objectives of an educational program of the institution are to prepare a student for gainful employment in a recognized occupation, the institution will--

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the

student.

(c) In order to participate in any Title IV, HEA program (other than the LEAP and NEISP programs), the institution must certify that it--

(1) Has in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution; and

(2)(i) Has established a campus security policy in accordance with section 485(f) of the HEA; and

(ii) Has complied with the disclosure requirements of § 668.47 as required by section 485(f) of the HEA.

(d)(1) The institution, if located in a State to which section 4(b) of the National Voter Registration Act (42 U.S.C. 1973gg-2(b)) does not apply, will make a good faith effort to distribute a mail voter registration form, requested and received from the State, to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make those forms widely available to students at the institution.

(2) The institution must request the forms from the State 120 days prior to the deadline for registering to vote within the State. If an institution has not received a sufficient quantity of forms to fulfill this section from the State within 60 days prior to the deadline for registering to vote in the State, the institution is not liable for not meeting the requirements of this section during that election year.

(3) This paragraph ~~applies~~ to elections as defined in section 301(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(1)), and includes the election for Governor or other chief executive within such State.

(e)(1) A program participation agreement becomes effective on the date that the Secretary signs the agreement.

(2) A new program participation agreement supersedes any prior program participation agreement between the Secretary and the institution.

(f)(1) Except as provided in paragraphs (h) and (i) of this section, the Secretary terminates a program participation agreement through the proceedings in subpart G of this part.

(2) An institution may terminate a program participation agreement.

(3) If the Secretary or the institution terminates a program participation agreement under paragraph (g) of this section, the Secretary establishes the termination date.

(g) An institution's program participation agreement automatically expires on the date that--

(1) The institution changes ownership that results in a change in control as determined by the Secretary under 34 CFR part 600; or

(2) The institution's participation ends under the provisions of § 668.26(a)(1), (2), (4), or (7).

(h) An institution's program participation agreement no longer applies to or covers a location of the institution as of the date on which that location ceases to be a part of the participating institution.

(Approved by the Office of Management and Budget under control number 1840- 0537)

(Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099a-3, 1099c, and 1141)

[54 FR 46538, Nov. 3, 1989; 55 FR 26200, June 27, 1990; 57 FR 57310, Dec. 3, 1992; 58 FR 32202, June 8, 1993; 58 FR 36870, July 9, 1993; 59 FR 21866, April 26, 1994; 59 FR 22423, 22425, April 29, 1994; 59 FR 32657, June 24, 1994; 59 FR 34964, July 7, 1994; 63 FR 40623, July 29, 1998; 64 FR 58617, Oct. 29, 1999; 64 FR 59038, Nov. 1, 1999; 65 FR 38729, June 22, 2000; 65 FR 65637, Nov. 1, 2000; 67 FR 67072, Nov. 1, 2002]

<General Materials (GM) - References, Annotations,
or Tables>

34 C. F. R. § 668.14

34 CFR § 668.14

END OF DOCUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20384 Summary Calendar

United States of America, ex rel, JAMES BOWAN,

Plaintiff-Appellant,

versus

EDUCATION AMERICA, INC.;
JERALD M. BARNETT, JR.;
PEDRO DEGUZMAN, ERIN J. HINKLE;
KARON J. ROSA; BOB SEELEY;
SUZETTE GOODMAN,

Defendants-Appellees.

Appeal from the United States District Court for
the Southern District of Texas
(USDC No. 4:00-CV-3028)

[FILED November 30, 2004]

Before REAVLEY, BARKSDALE and GARZA,
Circuit Judges

PER CURIUM:*

The district court ruled correctly in its memorandum and order of January 7, 2004. False certifications of compliance with applicable regulations and statutes governing participation in federal student financial aid programs under Title IV of the Higher Education Act did not constitute a basis for imposing liability on the defendants under the False Claims Act because the relator did not allege that the defendants made certifications of compliance with particular regulations on which payment was conditioned. U.S. ex rel Graves v. ITT Educational Services, Inc., 284 F. Supp.2d 487 (S.D. Tex. 2003). AFFIRMED.

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20460

UNITED STATES OF AMERICA, ex rel. Dan
GRAVES and Susan Newman

Plaintiffs-Appellants

versus

ITT EDUCATIONAL SERVICES, INC.,
PRICE WATERHOUSE, COOPERS LLP, and Rene
R. Champagne,

Defendant-Appellees

[FILED October 20, 2004]

Appeals from the United States District Court for
the Southern District of Texas
(Civ. A. H-99-3889)

Before DeMOSS, DENNIS, and CLEMENT, Circuit
Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

In this False Claims Act case Relators Dan Graves and Susan Newman sued ITT Educational Services, Inc. and its Chairman Rene R. Champagne (together "ITT") along with its auditor Pricewaterhouse Coopers, LLP, alleging violations of the False Claims Act, 31 U.S.C. § 3729, *et seq.* ITT participated in federal student financial aid programs under Title IV of the Higher Education Act of 1995, 20 U.S.C. § 1078, *et seq.* Under these programs the United States Government insured educational loans and made direct educational grants to students enrolled at ITT. Title IV, Part G, § 487(a)(20) of the HEA prohibits participating educational institutions such as ITT from making commission or incentive payments to admissions or recruitment personnel based on success in securing enrollments or financial aid to students. Relators contend that ITT and Champagne falsely promised to comply with the statute and falsely certified that ITT would comply with it. Relators also allege that Pricewaterhouse Coopers, in its audits of ITT, made false statements as to ITT's attestations of compliance and as to whether ITT's financial statements fairly represented its financial condition.

ITT moved to dismiss Relators' complaint under Rule 12(b)(6) and Pricewaterhouse Coopers moved to dismiss under Rules 12(b)(6) and 9(b). Based on the factual allegations in Relators' complaint and the facts presented in Relators' exhibits, the district court granted Defendants' motions to dismiss with prejudice. Having reviewed the record and fully considered the parties' briefs and oral arguments, we find no reversible error in the district court's judgment. We therefore AFFIRM

the district court's judgment, *United States ex rel. Graves v. ITT Educational Services, Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003), essentially for the reasons stated in its memorandum opinion and order.²

² For clarification purposes, we note shortly after the district court issued its opinion, a panel of this Court in *United States ex rel. Willard v. Humana Health Plan*, 336 F.3d 375 (5th Cir. 2003), stated: "While this Circuit has decided cases dealing with FCA liability based on express certifications of compliance with various statutes and regulations, we have not specifically addressed whether FCA liability can be based on an 'implied certification' theory." *Id.* at 381. Therefore, we must excise from an essential approval of the district court's reasons its statement that we have adopted an implied certification theory. 284 F. Supp. 2d at 497. Notwithstanding that statement, the district court reached the correct result.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11138

UNITED STATES OF AMERICA, ex rel. Ann GAY
and Jayne McCabe,

Plaintiffs-Appellants,

versus

LINCOLN TECHNICAL INSTITUTE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for
the Northern District of Texas
(Civ. A.301CV505K)

[FILED October 15, 2004]

Before DeMOSS, DENNIS, and CLEMENT, Circuit
Judges.

PER CURIUM:*

In this False Claims Act case Relators Ann
Gay and Jayne McCabe sued Lincoln Technical

* Pursuant to 5TH CIR. R. 47.5, the Court has
determined that this opinion should not be published
and is not precedent except under the limited
circumstances set forth in 5TH CIR. R. 47.5.4.

Institute, Inc. ("Lincoln") alleging violations of the False Claims Act, 31 U.S.C. §3729, *et seq.* Lincoln participated in federal student financial aid programs under Title IV of the Higher Education Act of 1995, 20 U.S.C. §1078, *et seq.* Under these programs the United States Government insured educational loans and made direct educational grants to students enrolled at Lincoln. Title IV, Part G, §487(a)(20) of the HEA prohibits participating educational institutions such as ITT from making commission or incentive payments to admissions or recruitment personnel based on success in securing enrollments or financial aid to students. Relators allege that Lincoln falsely promised that Lincoln would comply and certified that Lincoln had complied with this regulation.

In its memorandum and order, *United States ex rel. Gay v. Lincoln Tech. Inst., Inc.*, 2003 U.S. Dist. LEXIS 25968, 2003 WL 22474586 (N.D. Tex. Sept. 3, 2003), the district court dismissed Relators' complaint for failure to state a claim upon which relief can be granted. Having reviewed the record and fully considered the parties' respective briefing and arguments, we AFFIRM the district court's judgment for essentially the same reasons as well stated in its memorandum opinion and order.

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

**UNITED STATES OF AMERICA, ex rel. MARY
HENDOW and JULIE ALBERTSON,**

Plaintiffs,

v.

UNIVERSITY OF PHOENIX,

Defendant.

NO. CV S-03-457 GEB DAD

ORDER*

[FILED May 20, 2004]

Defendant University of Phoenix ("UOP") moves to dismiss Relators' Second Amended Complaint ("SAC"), arguing it fails to allege UOP submitted a false or fraudulent claim for payment to the United States in violation of the False Claims Act ("FCA").

Relators allege that an educational institution such as UOP seeking to participate in certain federal student financial aid programs must enter an agreement with the government promising that it will not compensate enrollment counselors based on

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

the number of students who enroll. (SAC ¶¶ 14, 24.) Relators further allege that UOP enters such an agreement annually, and knows it will breach that agreement because it compensates enrollment counselors based on the number of students who enroll. (Id. ¶ 29.)

UOP argues Relators' FCA claims must be dismissed because Relators do not allege "*an actual false claim* for payment being made to the Government." United States v. Kitsap Physicians Service, 314 F.3d 995, 1002 (9th Cir. 2002). "The False Claims Act . . . focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme." Id.

Relators allege "UOP submits a request for [financial aid] funds directly to the Secretary of the United States Department of Education." (SAC ¶ 33.) But they do not allege that those claims contain express false statements. Instead, Relators argue that UOP's claims constitute "implied certification" that UOP is in compliance with its agreement with the government. A false certification of compliance with applicable law only gives rise to an FCA claim if certification of compliance with a particular statute is a prerequisite to obtaining a government benefit. See United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) (holding that false certification of compliance with federal disability laws did not give rise to FCA claim since payment was not conditional on certification). Relators contend that 20 U.S.C. § 1094(a) imposes such a

certification requirement. 20 U.S.C. § 1094(a) provides:

In order to be an eligible institution for the purposes of [participating in federal student financial aid programs,] an institution must . . . enter into a program participation agreement with the Secretary [of Education]. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

....

(20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities. . . .

Since this statute only requires that UOP enter into an agreement, and does not require a certification, Relators' argument is unpersuasive.

Relators alternatively argue that UOP's actions give rise to a "promissory fraud" FCA claim. Promissory fraud can be actionable where a claimant intentionally makes a "false certification" that it will comply with a particular law when such certification is "a prerequisite for the [claimant] to receive

[federal] funds," and subsequently submits a claim for payment despite its failure to comply with that law. Hopper, 91 F.3d at 1267. Since Relators have not identified any certification which is a prerequisite for UOP to receive federal funds, this argument also fails.¹

UOP requests that the SAC be dismissed with prejudice, and Relators do not request leave to amend. Therefore, the SAC is dismissed with prejudice. Judgment shall be entered in favor of Defendant.

IT IS SO ORDERED.

DATED: May 19, 2004

/s/

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT
JUDGE

¹ Relators also argue that UOP makes a certification in "management assertion letters" written by UOP management for an annual compliance audit . . . performed by an independent certified public accountant." (SAC ¶ 30.) But Relators identify no statute or regulation which makes any certification in these letters a prerequisite to the receipt of federal funds.

UNITED STATES DEPARTMENT OF
EDUCATION

THE DEPUTY SECRETARY

October 30, 2002

MEMORANDUM

TO: Terri Shaw
Chief Operating Officer
Federal Student Aid

FROM: William D. Hansen
Deputy Secretary

SUBJECT: Enforcement policy for violations of
incentive compensation prohibition by
institutions participating in student aid
programs

The purpose of this memorandum is to provide direction with regard to the Department's response to violations of section 487(a)(20) of the Higher Education Act, which prohibits participating institutions' payment of incentive compensation to any persons or entities engaged in student recruiting where such payments are based on student enrollment.¹

¹ Section 487(a)(20) also references incentive compensation for individuals engaged in some activities other than recruiting on behalf of an institution. While there have been few occasions where improper compensation for those other activities has come to the Department's attention, those activities should also be considered as covered by the direction in this Memorandum.

The statutory prohibition was designed to reduce the financial incentive for an institution to enroll students by misrepresenting the quality of the institution, or the ability of students to benefit from its educational programs. The Department has in the past measured the damages resulting from a violation as the total amount of student aid provided to each improperly recruited student. After further analysis, I have concluded that the preferable approach is to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department. Improper recruiting does not render a recruited student ineligible to receive student aid funds for attendance at the institution on whose behalf the recruiting is conducted. Accordingly, the Department should treat a violation of the law as a compliance matter for which remedial or punitive sanctions should be considered.

In some instances, violations of the prohibition, either themselves or in combination with other program violations, may constitute a basis for limitation, suspension, or termination action. However, much more commonly, the appropriate sanction to consider will be the imposition of a fine.

Violations of the prohibition are to be considered as consisting of the incentive payments to any persons or entities engaged in any student recruiting that relate to the number of students enrolled as a result of the recruiting. In determining the amount of a fine, the Office of Federal Student Aid (FSA) is to take into account the extent to which the institution appeared to be knowingly violating the law, as would

be evidenced, for example, by attempts to disguise its compensation plan and by other aggravating factors, such as documented misrepresentations to prospective students. On the other hand, mitigating factors such as arguable reliance on Department guidance and on the reasonable advice of legal counsel, among other things, should also be taken into account. The size of the payments to persons or entities engaged in student recruiting and the pervasiveness of the improper practices across an institution's enrollments should also bear on the magnitude of the fine to be imposed. In the exercise of its discretion, FSA may deem factors not described herein to be relevant to the determination of the amount of a fine.

The direction provided by this memorandum should result in the imposition of appropriately measured sanctions for improper incentive payments by institutions. I am confident that FSA will exercise sound discretion in assessing sanctions for violations of the incentive compensation prohibition.

cc: Brian W. Jones
General Counsel

Sally L. Stroup
Assistant Secretary,
Office of Postsecondary Education

**UNITED STATES
DEPARTMENT OF EDUCATION
STUDENT FINANCIAL ASSISTANCE**

CASE MANAGEMENT & OVERSIGHT

**PROGRAM PARTICIPATION AGREEMENT
(Ver. 10/99)**

Effective Date
of Approval:

The date on which this
Agreement is signed on behalf of
the Secretary of Education

Approval

Expiration Date: **June 30, 2006**

Reapplication

Date: **March 31, 2006**

Name of

Institution: **Oakland
City University**

Address of

Institution: **143 North Lucretia Street
Oakland City, IN 47660-1099**

OPE ID Number: **00182400**

Taxpayer Identification

Number (TIN): **350869063**

DUNS Number: **079655122**

The execution of this Agreement by the Institution
and the Secretary is a prerequisite to the

Institution's initial or continued participation in any Title IV, HEA Program.

The postsecondary educational institution listed above, referred to hereafter as the "Institution," and the United States Secretary of Education, referred to hereafter as the "Secretary," agree that the Institution may participate in those student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA Programs) indicated under this Agreement and further agrees that such participation is subject to the terms and conditions set forth in this Agreement. As used in this Agreement, the term "Department" refers to the U.S. Department of Education.

SCOPE OF COVERAGE

This Agreement applies to all locations of the Institution as stated on the most current **ELIGIBILITY AND CERTIFICATION APPROVAL REPORT** issued by the Department. This Agreement covers the Institution's eligibility to participate in each of the following listed Title IV, HEA programs, and incorporates by reference the regulations cited.

- **FEDERAL PELL GRANT PROGRAM, 20 U.S.C. 1070a et seq; 34 CFR Part 690.**
- **FEDERAL FAMILY EDUCATION LOAN PROGRAM, 20 U.S.C 1071 et seq; 34 CFR Part 682.**

- **FEDERAL DIRECT STUDENT LOAN PROGRAM**, 20 U.S.C. 1087a et seq; 34 CFR Part 685.
- **FEDERAL PERKINS LOAN PROGRAM**, 20 U.S.C. 1087aa et seq; 34 CFR Part 674.
- **FEDERAL SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM**, 20 U.S.C. 1070b et seq; 34 CFR Part 676.
- **FEDERAL WORK-STUDY PROGRAM**, 42 U.S.C. 2751 et seq; 34 CFR Part 675.

GENERAL TERMS AND CONDITIONS

1. The Institution understands and agrees that it is subject to and will comply with the program statutes and implementing regulations for institutional eligibility as set forth in 34 CFR Part 600 and for each Title IV, HEA program in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA, and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668.

The recitation of any portion of the statute or regulations in this Agreement does not limit the Institution's obligation to comply with other applicable statutes and regulations.

2. a. The Institution certifies that on the date it signs this Agreement, it has a drug abuse

prevention program i operation that it has determined is accessible to any officer, employee, or student at the Institution.

- b. The Institution certifies that on the date it signs this Agreement, it is in compliance with the disclosure requirements of Section 485(f) of the HEA (Campus Security Policy and Crime Statistics).

3. The Institution agrees to comply with —

- a. Title VI of the Civil Rights Act of 1964, as amended, and the implementing regulations, 34 CFR Parts 100 and 101 (barring discrimination on the basis of race, color or national origin);
- b. Title IX of the Education Amendments of 1972 and the implementing regulations, 34 CFR Part 106 (barring discrimination on the basis of sex);
- c. The Family Rights and Privacy Act of 1974 and the implementing regulations, 34 CFR Part 99;
- d. Section 504 of the Rehabilitation Act of 1973 and the implementing regulations, 34 CFR Part 104 (barring discrimination on the basis of physical handicap); and
- e. The Age Discrimination Act of 1975 and the implementing regulations, 34 CFR Part 110.

4. The Institution acknowledges that 34 CFR Parts 602 and 667 require accrediting agencies, State regulatory bodies, and the Secretary to share information about institutions. The Institution agrees that the Secretary, any accrediting agency recognized by the Secretary, and any State regulatory body may share or report information to one another about the Institution without limitation.
5. The Institution acknowledges that the HEA prohibits the Secretary from recognizing the accreditation of any institution of higher education unless that institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action.

**SELECTED PROVISIONS FROM GENERAL
PROVISIONS REGULATIONS,
34 CFR PART 668**

By entering into this Program Participation Agreement, the Institution agrees that;

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other

earnings thereon, solely for the purposes specified in and in accordance with that program;

(2) As a fiduciary responsible for administering Federal funds, if the institution is permitted to request funds under a Title IV, HEA program advance payment method, the institution will time its requests for funds under the program to meet the institution's immediate Title IV, HEA program needs;

(3) It will not request from or charge any student a fee for processing or handling any application, form, or data required to determine a student's eligibility for, and amount of, Title IV, HEA program assistance;

(4) It will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under the Title IV HEA programs, together with assurances that the institution will provide, upon request and in a timely manner, information relating to the administrative capability and financial responsibility of the institution to—

(i) The Secretary;

(ii) The State [regulatory bodies] for the State or States in which the institution or any of the institution's branch campuses or other locations are located;

(iii) A guaranty agency, as defined in 34 CFR part 682, that guarantees loans made under the Federal Stafford Loan, and Federal PLUS programs for attendance at the institution or any of the institution's branch campuses or other locations;

(iv) The nationally recognized accrediting agency that accredits or preaccredits the institution or any of the institution's branch campuses, other locations, or educational programs;

(v) The State agency that legally authorizes the institution and any branch campus or other location of the institution to provide postsecondary education; and

(vi) In the case of a public postsecondary vocational educational institution that is approved by a State agency recognized for the approval of public postsecondary vocational education, that State agency;

(5) It will comply with the provisions of §668.15 relating to factors of financial responsibility;

(6) It will comply with the provisions of §668.16 relating to standards of administrative capability;

(7) It will submit reports to the Secretary and, in the case of an institution participating in the Federal Stafford Loan, Federal PLUS, or the Federal Perkins Loan Program, to holders of loans made to the institution's students under that program at such times and containing such information as the

Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs;

(8) It will not provide any statement to any student or certification to any leader under the Federal Stafford Loan or Federal PLUS Program that qualifies the student for a loan or loans in excess of the amount that the student is eligible to borrow in accordance with sections 425(a), 428(a)(2), 428(b)(1)(A) and (B), and 428H of the HEA;

(9) It will comply with the requirements of Subpart D of 34 CFR part 668 concerning institutional and financial assistance information for students and prospective students;

(10). In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, it will make available to prospective students, at or before the time that those students apply for enrollment-

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which an educational program offered by the institution is designed to prepare those prospective students;

(11) In the case of an institution participating in the Federal Stafford Loan, or

Federal PLUS Program, the institution will inform all eligible borrowers, as defined in 34 CFR part 682, enrolled in the institution about the availability and eligibility of those borrowers for State grant assistance from the State in which the institution is located, and will inform borrowers from another State of the source for further information concerning State grant assistance from that State;

(12) It will provide the certifications described in paragraph (c) of this section;

(13) In the case of an institution whose students receive financial assistance pursuant to section 484(d) of the HEA, the institution will make available to those students a program proven successful in assisting students in obtaining the recognized equivalent of a high school diploma;

(14) It will not deny any form of Federal financial aid to any eligible student solely on the grounds that the student is participating in a program of study abroad approved for credit by the institution;

(15) In the case of an institution seeking to participate for the first time in the Federal Stafford Loan and Federal PLUS programs, the institution has included a default management plan as part of its application under §668.12 for participation in those programs and will use the plan for at least two years from the date of that application. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default

reduction measures described in Appendix D to 34 CFR part 668;

(16) In the case of an institution that changes ownership that results in a change of control, or that changes its status as a main campus, branch campus, or an additional location, the institution will, to participate in the Federal Stafford Loan and Federal PLUS Programs, develop a default management plan for approval by the Secretary and implement the plan for at least two years after the change in control or status. The Secretary consider the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in Appendix D to 34 CFR part 668;

(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR Part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State [regulatory bodies], State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, and State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title IV, HEA programs or any information on fraud and abuse;

(18) It will not knowingly —

(i) Employ in a capacity that involves the administration of the Title IV, HEA programs or the

receipt of funds under those programs, an individual who has been convicted of, or his pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(ii) Contract with an institution or third-party servicer that has been terminated under section 432 of the HEA for a reason involving the acquisition, use, or expenditure of Federal, State, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; or

(iii) Contract with or employ any individual, agency, or organization that has been, or whose officers or employees have been—

(A) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(B) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(19) It will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted

as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal collection effort, as designated by the Secretary, regarding data on postsecondary institutions;

(20) In the case of an institution that offers athletically related student aid, it will comply with the provisions of paragraph (d) of this section;

(21) It will not impose any penalty, including, but not limited to, the assessment of isle fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that the student borrow additional funds for which interest or other charges are assessed, on any student because of the student's inability to meet his or her financial obligations to the institution as a result of the delayed disbursement of the proceeds of a Title IV, HEA program loan due to compliance with statutory and regulatory requirements of or applicable to the Title IV, HEA programs, or delays attributable to the institution;

(22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assistance, except that this requirement shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance. This provision does not apply to the giving of token gifts to students

or alumni for referring students for admission to the institution as long as: the gift is not in the form of money, check, or money order; no more than one such gift is given to student or alumnus; and the gift has a value of not more than \$25;

(23) It will meet the requirements established pursuant to Part H of Title IV of the HEA by the Secretary, State [authorizing bodies], and nationally recognized accrediting agencies;

(24) -It will comply with the refund provisions established in 668.22;

(25) It is liable for all improperly administered funds received or refunded under the Title IV, HEA programs, including any funds administered by a third-party servicer; and

(26) If the stated objectives of an educational program of the institution are to prepare a student for gainful employment in a recognized occupation, the institution will—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the program is offered, if the State has

established such a requirement, or as established by any Federal agency; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

(c) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), the institution must certify that it—

(1) Has in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution; and

(2)(i) Has established a campus security policy in accordance with section 485(f) of the HEA; and

(ii) Has complied with the disclosure requirements of §668.47 as required by section 485(f) of the HEA.

(d) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), an institution that offers athletically related student aid must—

(1) Cause an annual compilation, independently audited not less often than every 3 years, to be prepared within 6 months after the end of the institution's fiscal year, of—

(i) The revenues derived by the institution from the institution's intercollegiate athletics activities, according to the following categories:

(A) Total revenues.

(B) Revenues from football.

(C) Revenues from men's basketball.

(D) Revenues from women's basketball.

(E) Revenues from all other men's sports combined.

(F) Revenues from all other women's sports combined;

(ii) Expenses made by the institution for the institution's intercollegiate athletics activities, according to the following categories:

(A) Total expenses.

(B) Expenses attributable to football.

(C) Expenses attributable to men's basketball.

(D) Expenses attributable to women's basketball.

(E) Expenses attributable to all other men's sports combined.

(F) Expenses attributable to all other women's sports combined; and

(iii) The total revenues and operating expenses of the institution; and

(2) Make the compilation and, where allowable by State law, the results of the audits required by paragraph (d)(1) of this section available for inspection by the Secretary and the public.

(e) For the purposes of paragraph (d) of this section—

(1) Revenues from intercollegiate athletics activities allocable to a sport shall include without limitation gate receipts, broadcast revenues and other conference distributions, appearance guarantees and options, concessions, and advertising;

(2) Revenues such as student activities fees, alumni contributions, and investment interest income that are not allocable to a sport shall be included in the calculation of total revenues only;

(3) Expenses for intercollegiate athletics activities allocable to a sport shall include without limitation grants-in-aid, salaries, travel, equipment, and supplies; and

(4) Expenses such as general and administrative overhead that are not allocable to a sport shall be included in the calculation of total expenses only.

(f)(1) A program participation agreement becomes effective on the date that the Secretary signs the agreement.

(2) A new program participation agreement supersedes any prior program participation agreement between the Secretary and the institution.

(g)(1)(i) With respect to an institution that has been certified *other than under a provisional certification*—

(A) Except as provided in paragraphs (b) and (i) of this section, the Secretary terminates a program participation agreement through the proceedings in subpart G of this part.

(B) An institution may terminate a program participation agreement.

(C) If the Secretary or the institution terminates a program participation agreement under paragraph (g) of this section, the Secretary establishes the termination date.

(2) With respect to an institution that has been *provisionally certified*, the Secretary revokes a provisional certification through the proceedings in §668.13(f).

(h) An institution's program participation agreement automatically expires on the date that—

(1) The institution changes ownership that results in a change in control as determined by the Secretary under 34 CFR part 600; or

(2) The institution's participation ends under the provisions of §668.26(a)(1), (2), (4), or (7).

(i) An institution's program participation agreement no longer applies to or covers a location of the institution as of the date on which that location ceases to be a part of the participating institution.

CERTIFICATIONS REQUIRED FROM INSTITUTIONS

The Institution should refer to the regulations cited below. Signature on this Agreement provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying", and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirement for Drug-Free Workplace (Grants)." Breach of any of these certificates constitutes a breach of this Agreement.

PART 1 CERTIFICATION REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

1. Lobbying

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over \$100,000, as defined at 34 CFR Part

B2, Sections 82.105, and 82.110, the Institution certifies that;

- (a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;
- (b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal Grant or cooperative agreement, the Institution shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with all subrecipients shall certify and disclose accordingly.
- (c) The Institution shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and

subcontracts) and that all subrecipients shall certify and disclose accordingly.

***2. Debarment, Suspension,
and Other Responsibility Matters***

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions as defined at 34 CFR Part 85, Sections 85.105 and 85.110, the Institution certifies that it and its principals:

- (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
- (b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
- (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local)

with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

- (d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.

3. Drug-Free Workplace (Grantees Other Than Individuals)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605; and 85.610 –

The Institution certifies that it will or will continue to provide a drug-free workplace by:

- (a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
- (b) Establishing an on-going drug-free awareness program to inform employees about–
 - (1) The dangers of drug abuse in the workplace;

- (2) The Institution's policy of maintaining a drug-free workplace;
 - (3) Any available drug counseling, rehabilitation, and employee assistance programs; and
 - (4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- (c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);
- (d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will –
- (1) Abide by the terms of the statement, and
 - (2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
- (e) Notifying the agency, in writing, within 10 calendar days after receiving notice under this subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title,

to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-5140. Notice shall include the identification number(s) of each affected grant;

- (f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted –
 - (1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1972, as amended; or
 - (2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.
- (g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

***4. Drug-Free Workplace
(Grantees Who Are Individuals)***

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for

grantees, as defined at 34 CFR Part 85, Sections 85.605, and 85.610 –

1. As a condition of the grant, the Institution certifies that it will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and
2. If any officer or owner of the Institution is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, the Institution will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-5140. Notice shall include the identification number(s) of each affected grant.

PART 2 U.S. DEPARTMENT OF EDU- CATION DRUG PREVENTION CERTIFICATION

The undersigned Institution certifies that it has adopted and implemented a drug prevention program for its students and employees that, at a minimum, includes—

1. The annual distribution in writing to each employee, and to each student who is taking one or more classes for any kind of academic credit except for continuing education units,

regardless of the length of the student's program of study, of:

- Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities.
- A description of the applicable legal sanctions under local, State or Federal law for the unlawful possession or distribution of illicit drugs and alcohol.
- A description of the health risks associated with the use of illicit drugs and the abuse of alcohol.
- A description of any drug or alcohol counseling, treatment, or re-entry programs that are available to employees or students.
- A clear statement that the Institution will impose disciplinary sanctions on students and employees (consistent with local, State and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violation of the standards of conduct. A disciplinary sanction may include the completion of an appropriate rehabilitation program.

2. A biennial review by the Institution of its program to:

- Determine its effectiveness and implement changes to the program if they are needed.
- Ensure that its disciplinary sanctions are consistently enforced.

**PART 3 CERTIFICATION REGARDING DE-
BARMENT, SUSPENSION, IN-
ELIGIBILITY, AND VOLUNTARY
EXCLUSION LOWER TIER COV-
ERED TRANSACTIONS**

The Institution is to obtain the signatures of Lower Tier Contractors on facsimiles of the certification reproduced below, and retain in the Institution's files.

**CERTIFICATION BY LOWER TIER
CONTRACTOR**

**(Before Completing Certification, Read
Instructions for This Part 3, below)**

- (1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal Department or Agency.

- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

University Accounting
Service

Name of Lower Tier
Organization

Lori S. Hartvov
Name of Authorized
Representative

/s/
Signature of Authorized
Representative

Student
Loan Billing
PR/Award Number
or Project Name

Support Manager
Title of Authorized
Representative

6/12/00
Date

1. By signing and submitting this proposal, the prospective lower tier participant is providing certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to whom this proposal is submitted for assistance in obtaining a copy of these regulations.
5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification

Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions,” without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded

from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

NOTE: The "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions" form is to be retained by the Institution.

IN WITNESS WHEREOF

the parties hereto have caused this Agreement to be executed by their duly authorized representatives

Signature of Institution's
Chief Executive Officer:

_____/s/____

Date: June 21, 2000

Print Name and Title:

_____/s/____

For the Secretary:

U.S. Department of Education

_____/s/____

Date: July 10, 2000

**U.S. DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION
STUDENT FINANCIAL ASSISTANCE
PROGRAMS
INSTITUTIONAL PARTICIPATION &
OVERSIGHT SERVICE**

**PROGRAM PARTICIPATION AGREEMENT
[PROVISIONAL APPROVAL]
(VER. 5/97)**

Effective Date
of Approval:

The date on which this
Agreement is signed on behalf of
the Secretary of Education

Approval

Expiration Date: **June 30, 2000**

Reapplication
Date:

March 31, 2000

Name of
Institution:

**Oakland
City University**

Address of
Institution:

**143 North Lucretia Street
Oakland City, IN 47660-1099**

Office of Postsecondary Education
Identification Number:

00182400

U.S. Department of Education Central

Registry Service Number:

1350869063A1

The execution of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, HEA Program.

The postsecondary educational institution (Institution) listed above, referred to hereafter as the "Institution" and the United States Secretary of Education, referred to hereafter as the "Secretary," agree that the Institution may participate in those student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA Programs) indicated under this Agreement and further agrees that such participation is subject to the terms and conditions set forth in this Agreement. As used in this Agreement, the term "Department" refers to the U.S. Department of Education.

SCOPE OF COVERAGE

This Agreement applies to all locations of the Institution as stated on the most current **ELIGIBILITY AND CERTIFICATION APPROVAL REPORT** issued by the Department. This Agreement covers the institution's eligibility to participate in each of the following listed Title IV, HEA programs, and incorporates by reference the regulations cited.

- **FEDERAL PELL GRANT PROGRAM**, 20 U.S.C. 1070a *et seq*; 34 CFR Part 690.
- **FEDERAL FAMILY EDUCATION LOAN PROGRAM**, 20 U.S.C. 1071 *et seq*; 34 CFR Part 682.

- **FEDERAL DIRECT STUDENT LOAN PROGRAM**, 20 U.S.C. 1087a *et seq*; 34 CFR Part 685.
- **FEDERAL PERKINS LOAN PROGRAM**, 20 U.S.C. 1087aa *et seq*; 34 CFR Part 674.
- **FEDERAL SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM**, 20 U.S.C. 1070b *et seq*; 34 CFR Part 676.
- **FEDERAL WORK-STUDY PROGRAM**, 42 U.S.C. 2751 *et seq*; 34 CFR Part 675.

PROVISIONAL CERTIFICATION

This provisional certification is granted for a limited period to permit the Institution to participate in the Title IV, HEA Programs referenced in this Agreement. During the period of provisional certification, the participation of the Institution will be subject to revocation for cause. Cause for revocation includes, without limitation, a failure to comply with any provision set forth in this Agreement, a violation of Department regulations deemed material by the Department, or a material misrepresentation in the material submitted to the Department as part of the Institution's application process for this certification. The Department in its sole discretion may provide the Institution with an opportunity to cure any such failure, may place the Institution on reimbursement funding pending a decision regarding revocation of this Agreement by a designated Department official, or may suspend the

participation of the Institution pending a decision by the Department regarding revocation of this Agreement. In the event the Department chooses to revoke this Agreement and the Institution's participation in the Title IV, HEA programs, the Institution will have the right to show cause why this Agreement should not be revoked by presenting its objections to the designated Department official in writing. The Institution agrees that this opportunity to show cause, and not the procedures in 34 CFR 668 subpart G, shall be the sole administrative appeal regarding such revocation. The decision by the designated Department official will constitute the final agency action.

Special Requirements for Substantial Changes Made During Term of Provisional Certification

Any institution, whether provisionally certified or generally certified, must apply for and receive approval by the Secretary of any substantial change (as hereinafter identified) before it may award, disburse or distribute Title IV, HEA funds based on the substantial change. Substantial changes generally include, but are not limited to: (a) establishment of an additional location; (b) change in ownership, merger or change of type of institution (such as conversion from proprietary to private nonprofit); (c) increase in the level of academic offering beyond those listed in the Institution's Eligibility and Certification Approval Report (ECAR); (d) addition of any nondegree or short-term training program that is not within the immediate scope of programs listed in the ECAR; (e) change in the form of educational measurement; (f) change of

State authorizing agency or of primary accrediting agency; or (g) any waiver or recognition of regulatory exception.

If the Institution applies for the Secretary's approval of a substantial change, it must show good cause for making any such substantial change and, in the case of any change described in (a) through (d), the Institution must demonstrate that it has the financial and administrative resources necessary to assure the Institution's continued compliance with the standards of financial responsibility (34 CFR 668.15) and administrative capability (34 CFR 668.16).

Reasons and Special Conditions of Provisional Certification

Federal Perkins Loan Default Rate Condition

The Institution's default rate under the Federal Perkins Loan Program that was published most recently prior to the effective date of this Agreement, exceeds 30 percent. If the Institution's published default rate in the future does not exceed 30 percent and if there is no other indication of the Institution's inability to meet the standards of financial responsibility and administrative capability, then the Institution may request to be removed from provisional certification and receive a new Program Participation Agreement.

If, prior to expiration of this Provisional Program Participation Agreement on June 30, 2000, the Institution applies for recertification, the Institution

will be subject to continued provisional approval if the most recent published default rate of the Institution for the Federal Perkins Loan Program exceeds 30 percent, and there are no other factors that demonstrate a lack of compliance with 34 CFR 668.15 (*Factors of Financial Responsibility*) and 34 CFR 668.16 (*Standards of Administrative Capability*).

Application for Recertification

Upon completion of the period of provisional certification, if the Institution wishes to apply for recertification to participate in the Title IV, HEA programs, the Institution must submit a completed application for Institutional Participation (ED Form E40-34P), together with all required supporting documentation, no later than March 31, 2000.

Grant or Denial of Full Certification

Notwithstanding any paragraph above, the provisional certification ends upon the Department's notification to the Institution of the Department's decision to grant or deny a four year certification to participate in the Title IV, HEA Programs.

GENERAL TERMS AND CONDITIONS

1. The institution understands and agrees that it is subject to and will comply with the program statutes and implementing regulations for institutional eligibility as set forth in 34 CFR Part 600 and for each Title IV, HEA Program in which it participates, as well as the general

provisions set forth in Part F and Part G of Title IV of the HEA, and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668. *The recitation of any portion of the statute or regulations in this Agreement does not limit the Institution's obligation to comply with other applicable statutes and regulations.*

2. a. The Institution certifies that on the date it signs this Agreement, it has a drug abuse prevention program in operation that it has determined is accessible to any officer, employee, or student at the Institution.
- b. The Institution certifies that on the date it signs this agreement, it is in compliance with the disclosure requirements of Section 485(f) of the HEA (Campus Security Policy and Crime Statistics).
3. Institution agrees to comply with —
 - a. Title VI of the Civil Rights Act of 1964, as amended, and the implementing regulations, 34 CFR Parts 100 and 101 (barring discrimination on the basis of race, color or national origin);
 - b. Title IX of the Education Amendments of 1972 and the implementing regulations, 34 CFR Part 106 (barring discrimination on the basis of sex);

- c. The Family Rights and Privacy Act of 1974 and the implementing regulations, 34 CFR Part 99;
 - d. Section 504 of the Rehabilitation Act of 1973 and the implementing regulations, 34 CFR Part 104 (barring discrimination on the basis of physical handicap); and
 - e. The Age Discrimination Act of 1975 and the implementing regulations, 34 CFR Part 110.
4. The Institution acknowledges that 34 CFR Parts 602 and 667 require accrediting agencies, State regulatory bodies, and the Secretary to share information about institutions. The Institution agrees that the Secretary, any accrediting agency recognized by the Secretary, and State regulatory body may share or report information to one another about the Institution without limitation.
5. The Institution acknowledges that the HEA prohibits the Secretary from recognizing the accreditation of any institution of higher education unless that institution agrees to submit any dispute involving the final denial withdrawal, or termination of accreditation to initial arbitration prior to any other legal action.

**Selected Provisions From
GENERAL PROVISIONS REGULATIONS,
34 CFR PART 668**

By entering into this Program Participation Agreement, the Institution agrees that:

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;

(2) As a fiduciary responsible for administering Federal funds, if the institution is permitted to request funds under a Title IV, HEA program advance payment method, the institution will time its requests for funds under the program to meet the institution's immediate Title IV, HEA program needs;

(3) It will not request from or charge any student a fee for processing or handling any application, form, or data required to determine a student's eligibility for, and amount of, Title IV, HEA program assistance;

(4) It will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under the Title IV, HEA programs, together with assurances that the institution will provide, upon request and in a timely manner, information relating to the administrative capability and financial responsibility of the institution to—

(i) The Secretary;

(ii) The State [regulatory bodies] for the State or States in which the institution or any of the institution's branch campuses or other locations are located;

(iii) A guaranty agency, as defined in 34 CFR part 682, that guarantees loans made under the Federal Stafford Loan, and Federal PLUS programs for attendance at the institution or any of the institution's branch campuses or other locations;

(iv) The nationally recognized accrediting agency that accredits or preaccredits the institution or any of the institution's branch campuses, other locations, or educational programs;

(v) The State agency that legally authorizes the institution and any branch campus or other location of the institution to provide postsecondary education; and

(vi) In the case of a public postsecondary vocational educational institution that is approved by a State agency recognized for the approval of public postsecondary vocational education, that State agency;

(5) It will comply with the provisions of §668.15 relating to factors of financial responsibility;

(6) It will comply with the provisions of §668.16 relating to standards of administrative capability;

(7) It will submit reports to the Secretary and, in the case of an institution participating in the Federal Stafford Loan, Federal PLUS, or the Federal Perkins Loan Program, to holders of loans made to the institution's students under that program at such times and containing such information as the Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs;

(8) It will not provide any statement to any student or certification to any lender under the Federal Stafford Loan, Federal or PLUS, Program that qualifies the student for a loan or loans in excess of the amount that the student is eligible to borrow in accordance with sections 425(a), 428(a)(2), 428(b)(1)(A) and (B), and 428H of the HEA;

(9) It will comply with the requirements of Subpart D of 34 CFR part 668 concerning institutional and financial assistance information for students and prospective students;

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, it will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job

for which an educational program offered by the institution is designed to prepare those prospective students;

(11) In the case of an institution participating in the Federal Stafford Loan, or Federal PLUS Program, the institution will inform all eligible borrowers, as defined in 34 CFR part 682, enrolled in the institution about the availability and eligibility of those borrowers for State grant assistance from the State in which the institution is located, and will inform borrowers from another State of the source for further information concerning State grant assistance from that State;

(12) It will provide the certifications described in paragraph (c) of this section;

(13) In the case of an institution whose students receive financial assistance pursuant to section 484(d) of the HEA, the institution will make available to those students a program proven successful in assisting students in obtaining the recognized equivalent of a high school diploma;

(14) It will not deny any form of Federal financial aid to any eligible student solely on the grounds that the student is participating in a program of study abroad approved for credit by the institution;

(15) In the case of an institution seeking to participate for the first time in the Federal Stafford Loan and Federal PLUS programs, the institution has included a default management plan as part of its application under §668.12 for participation in

those programs and will use the plan for at least two years from the date of that application. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in Appendix D to 34 CFR part 668;

(16) In the case of an institution that changes ownership that results in a change of control, or that changes its status as a main campus, branch campus, or an additional location, the institution will, to participate in the Federal Stafford Loan and Federal PLUS programs, develop a default management plan for approval by the Secretary and implement the plan for at least two years after the change in control or status. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan, developed in accordance with the default reduction measures described in Appendix D to 34 CFR part 668;

(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State [regulatory bodies], State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, and State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title IV, HEA programs or any information on fraud and abuse;

(18) It will not knowingly—

(i) Employ in a capacity that involves the administration of the Title IV, HEA programs or the receipt of funds under those programs, an individual who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(ii) Contract with an institution or third-party servicer that has been terminated under section 432 of the HEA for a reason involving the acquisition, use, or expenditure of Federal, State, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; or

(iii) Contract with or employ any individual, agency, or organization that has been, or whose officers or employees have been—

(A) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(B) Administratively or judicially determined to have committed fraud or any other material

violation of law involving Federal, State, or local government funds;

(19) It will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal collection effort, as designated by the Secretary, regarding data on postsecondary institutions;

(20) In the case of an institution that offers athletically related student aid, it will comply with the provisions of paragraph (d) of this section;

(21) It will not impose any penalty, including, but not limited to, the assessment of late fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that the student borrow additional funds for which interest or other charges are assessed, on any student because of the student's inability to meet his or her financial obligations to the institution as a result of the delayed disbursement of the proceeds of a Title IV, HEA program loan due to compliance with statutory and regulatory requirements of or applicable to the Title IV, HEA programs, or delays attributable to the institution;

(22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student

financial assistance, except that this requirement shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance. This provision does not apply to the giving of token gifts to students or alumni for referring students for admission to the institution as long as: the gift is not in the form of money, check, or money order; no more than one such gift is given to any student or alumnus; and the gift has a value of not more than \$25;

(23) It will meet the requirements established pursuant to part H of Title IV of the HEA by the Secretary, State [authorizing bodies], and nationally recognized accrediting agencies;

(24) It will comply with the refund provisions established in 668.22;

(25) It is liable for all improperly administered funds received or refunded under the Title IV, HEA programs, including any funds administered by a third-party servicer; and

(26) If the stated objectives of an educational program of the institution are to prepare a student for gainful employment in a recognized occupation, the institution will—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does

not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

(c) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), the institution must certify that it—

(1) Has in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution; and

(2)(i) Has established a campus security policy in accordance with section 485(f) of the HEA; and

(ii) Has complied with the disclosure requirements of §668.47 as required by section 485(f) of the HEA.

(d) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), an institution that offers athletically related student aid must—

(1) Cause an annual compilation, independently audited not less often than every 3 years, to be prepared within 6 months after the end of the institution's fiscal year, of—

(i) The revenues derived by the institution from the institution's intercollegiate athletics activities, according to the following categories;

(A) Total revenues.

(B) Revenues from football.

(C) Revenues from men's basketball.

(D) Revenues from women's basketball.

(E) Revenues from all other men's sports combined.

(F) Revenues from all other women's sports combined;

(ii) Expenses made by the institution for the institution's intercollegiate athletics activities, according to the following categories:

(A) Total expenses.

(B) Expenses attributable to football.

(C) Expenses attributable to men's basketball.

(D) Expenses attributable to women's basketball.

(E) Expenses attributable to all other men's sports combined.

(F) Expenses attributable to all other women's sports combined; and

(iii) The total revenues and operating expenses of the institution; and

(2) Make the compilation and, where allowable by State law, the results of the audits required by paragraph (d)(1) of this section available for inspection by the Secretary and the public.

(e) For the purposes of paragraph (d) of this section—

(1) Revenues from intercollegiate athletics activities allocable to a sport shall include without limitation gate receipts, broadcast revenues and other conference distributions, appearance guarantees and options, concessions, and advertising;

(2) Revenues such as student activities fees, alumni contributions, and investment interest income that are not allocable to a sport shall be included in the calculation of total revenues only;

(3) Expenses for intercollegiate athletics activities allocable to a sport shall include without limitation grants-in-aid, salaries, travel, equipment, and supplies; and

(4) Expenses such as general and administrative overhead that are not allocable to a sport shall be included in the calculation of total expenses only.

(f)(1) A program participation agreement becomes effective on the date that the Secretary signs the agreement.

(2) A new program participation agreement supersedes any prior program participation agreement between the Secretary and the institution.

(g)(1)(i) With respect to an institution that has been certified *other than under a provisional certification*—

(A) Except as provided in paragraphs (h) and (i) of this section, the Secretary terminates a program participation agreement through the proceedings in subpart G of this part.

(B) An Institution may terminate a program participation agreement.

(C) If the Secretary or the institution terminates a program participation agreement under paragraph (g) of this section, the Secretary establishes the termination date.

(2) With respect to an institution that has been *provisionally certified*, the Secretary revokes a provisional certification through the proceedings in §668.13(f).

(h) An institution's program participation agreement automatically expires on the date that—

(1) The Institution changes ownership that results in a change in control as determined by the Secretary under 34 CFR part 600; or

(2) The institution's participation ends under the provisions of §668.26(a)(1), (2), (4), or (7).

(i) An institution's program participation agreement no longer applies to or covers a location of the institution as of the date on which that location ceases to be a part of the participating institution.

CERTIFICATIONS REQUIRED FROM INSTITUTIONS

The Institution should refer to the regulations cited below. Signature on this Agreement provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying", and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirement for Drug-Free Workplace (Grants)." Breach of any of these certificates constitutes a breach of this Agreement.

**PART 1 CERTIFICATION REGARDING LOBBY-
ING; DEBARMENT, SUSPENSION AND
OTHER RESPONSIBILITY MATTERS; AND
DRUG-FREE WORKPLACE REQUIRE-
MENTS**

1. Lobbying

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over \$100,000, as defined at 34 CFR Part B2, Sections 82.105, and 82.110, the Institution certifies that:

- (a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;
- (b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal

Grant or cooperative agreement, the Institution shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with all subrecipients shall certify and disclose accordingly.

- (c) The Institution shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

2. Debarment, Suspension, and Other Responsibility Matters

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions as defined at 34 CFR Part 85, Sections 85.105 and 85.110,

the Institution certifies that it and its principals:

- (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
- (b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in

connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

- (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
- (d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.

3. Drug-Free Workplace (Grantees Other Than Individuals)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, defined at 34 CFR Part 85, Sections 85.605, and 85.610 -

The Institution certifies that it will or will continue to provide a drug-free workplace by:

- (a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled

substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an on-going drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The Institution's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement, and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug

statute occurring in the workplace no later than five calendar days after such conviction;

- (e) Notifying the agency, in writing, within 10 calendar days after receiving notice under this subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants and Contracts Service, U.S. Department of Education, 600 Independence Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant;
- (f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—
 - (1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1972, as amended; or
 - (2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

- (g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

**4. Drug-Free Workplace
(Grantees Who Are Individuals)**

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605, and 85.610—

1. As a condition of the grant, the Institution certifies that it will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;
2. If any officer or owner of the Institution is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, the Institution will report the conviction, in writing, within 10 calendar days of conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 300 Independence Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant.

**PART 2 U.S. DEPARTMENT OF EDUCATION
DRUG PREVENTION CERTIFICATION**

The undersigned Institution certifies that it has adopted and implemented a drug prevention program for its students and employees that, at a minimum, includes—

1. The annual distribution in writing to each employee, and to each student who is taking one or more classes for any kind of academic credit except for continuing education units, regardless of the length of the student's program of study of:
 - Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities.
 - A description of the applicable legal sanctions under local, State or Federal law for the unlawful possession or distribution of illicit drugs and alcohol
 - A description of the health risks associated with the use of illicit drugs and the abuse of alcohol.
 - A description of any drug or alcohol counseling, treatment, or re-entry programs that are available to employees or students.
 - A clear statement that the Institution will impose disciplinary sanctions on students and

employees (consistent with local, State and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violation of the standards of conduct. A disciplinary sanction may include the completion of an appropriate rehabilitation program.

2. A biennial review by the Institution of its program to:

- Determine its effectiveness and implement changes to the program if they are needed.
- Ensure that its disciplinary sanctions are consistently enforced.

**PART 3 CERTIFICATION REGARDING DEBAR-
MENT, SUSPENSION, INELIGIBILITY,
AND VOLUNTARY EXCLUSION — LOWER
TIER COVERED TRANSACTIONS**

The Institution is to obtain the signatures of Lower Tier Contractors on facsimilies of the certification reproduced below, and retain in the Institution's files.

**CERTIFICATION BY LOWER TIER
CONTRACTOR**

**(Before Completing Certification, Read
Instructions for This Part 3, below)**

- (1) The Prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal Department or Agency.
- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Name of Lower Tier
Organization

PR/Award Number
or Project Name

Name of Authorized
Representative

Title of Authorized
Representative

Signature of Authorized
Representative

Date

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies

available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to whom this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the

department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion-Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a

lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

NOTE: The "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions" form is to be retained by the applicant institution.

IN WITNESS WHEREOF

the parties hereto have caused this Agreement to be executed by their duly authorized representatives

Signature of Institution's
Chief Executive Officer:

_____/s/____

Date: November 25, 1997

Print Name and Title:

_____/s/____

For the Secretary:

U.S. Department of Education

_____/s/____

Date: December 31, 1997

21
No. 05-1035

Supreme Court, U.S.
FILED

MAR 17 2006

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OAKLAND CITY UNIVERSITY,
founded by GENERAL BAPTISTS, INC.
d/b/a OAKLAND CITY UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.*
JEFFREY E. MAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

LANE C. SIESKY
BARBER, SHOULDERS
& SIESKY, LLP
123 N.W. Fourth Street
Suite 402
Evansville, Indiana 47708
(812) 425-9211

Attorneys for Respondent



QUESTION PRESENTED

In order to participate in various student loan and grant programs established under Title IV of the Higher Education Act of 1965, a post-secondary educational institution must first enter into a program participation agreement ("PPA") with the Department of Education. Each PPA expressly conditions a school's initial and continuing eligibility to receive funds under Title IV programs on compliance with specific statutory requirements, including a provision known as the incentive compensation ban, which prohibits schools from compensating recruiters based upon the number of students they enroll. *See* 20 U.S.C. § 1094(a)(20). In short, no school may receive any student loan or grant funds without first promising to comply with the incentive compensation ban in a written PPA. 34 C.F.R. 668.14(b)(22)(I).

The question presented in this case is whether a school's knowingly false promises to comply with the incentive compensation ban in mandatory PPAs are actionable under the False Claims Act where those false promises cause the submission of requests for student loans and grants that do not expressly reiterate those promises.

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STATEMENT

1. In Title IV of the Higher Education Act of 1965 ("HEA"), Pub. L. No. 89-329, 79 Stat. 1219, Congress established various student loan and grant programs, including the Federal Pell Grant Program ("Pell"), the Federal Family Education Loan Program ("FFELP"), and the Federal Direct Loan Program ("FDLP"). Although the mechanism by which Title IV funds are disbursed to eligible schools under each of these programs varies, each requires compliance with specific conditions as a prerequisite to obtaining federal funds. Thus, to become eligible to receive Title IV funds, or to have its students receive funds, under these programs, a school must first enter into a program participation agreement with DOE which "shall condition the initial and continuing eligibility of the school to participate in a program upon compliance with" specific requirements. 20 U.S.C. § 1094(a). *See also* 34 C.F.R. 668.14.

The principal statutory requirement at issue in this case is that schools "will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. § 1094(a)(20). Thus, by statutory command, the initial and continuing eligibility of schools to obtain Title IV funding depends on a requirement that those schools not pay certain types of commissions. Known commonly as the "incentive compensation ban," this statutory mandate is echoed in a regulation specifying the requirements that schools must expressly agree to adhere to in PPAs. *See* 34 C.F.R. 668.14(b)(22)(I).

Congress enacted the prohibition against paying commissions, bonuses, or other incentive payments based on success in recruiting students because such payments were associated with high loan default rates, which in turn resulted in a significant drain on program funds where the government acts as a loan guarantor. When Congress amended the HEA in 1992 to prohibit schools from paying these incentives, it did so based on evidence of serious program abuses, including incentive compensation. *See* S. Rep. No. 58, 102d Cong., 1st Sess., at 8 (1991) ("Abuses in Federal Student Aid Programs") (noting testimony "that contests were held whereby sales representatives earned incentive awards for enrolling the highest number of students for a given period"); H.R. Rep. No. 447, 102d Cong., 2d Sess., at 10, *reprinted in* 1992 U.S.C.C.A.N. 334, 343 (noting new provisions that "include prohibiting the use of commissioned sales persons and recruiters").

After a school becomes eligible to receive Title IV funds by entering into a PPA, claims for payment of those funds can be made in various ways. Under Pell and the FDLP, students submit requests for funding directly to DOE, or to DOE with the assistance of schools, while under the FFELP, students and schools jointly submit requests to private lenders for loans that are then guaranteed by state agencies and are, in turn, insured by DOE and paid in the event of a default. No matter how a claim is ultimately submitted to the government, however, the disbursement of federal funds is contingent upon statements made by schools that are required before requests for payment are considered. Such statements thus cause the submission of all subsequent claims for payment under any of these programs.

The Department of Education ("DOE") has broad authority to enforce the requirements for participating in federal student loan and grant programs, including the incentive compensation ban. By expressly conditioning a school's "initial and continuing eligibility" to participate in Title IV programs on compliance with specific statutory requirements, 20 U.S.C. § 1094(a), the HEA confers authority on DOE not only to take prospective enforcement actions (ranging from fines to disqualification from programs), but also to withhold payment immediately upon the discovery of non-compliance with those requirements. Among other things, DOE has authority to take "emergency action" to immediately withhold funds in certain circumstances where it receives reliable information regarding violations of statutory requirements. *See* 20 U.S.C. § 1094(c)(1)(G); 34 C.F.R. 668.83. And, DOE may impose prospective sanctions, including "the limitation, suspension, or termination of the participation" of the school in any Title IV program, 20 U.S.C. § 1094(c)(1)(F), or civil penalties, *id.* at 1094(c)(3)(B). *See also* 34 C.F.R. 668.82(a) & (c); 34 C.F.R. 682.700(a).

2. This case involves allegations under the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.*, that the petitioner, Oakland City University ("OCU"), knowingly made false promises to comply with the incentive compensation ban in order to become eligible (and remain eligible) to receive Title IV funds, that these statements were false when made, and that they caused DOE to pay various claims under Title IV programs. The *qui tam* relator, respondent Jeffrey Main (an admissions representative hired by OCU to recruit students for its adult degree programs), alleges that OCU's knowing submissions of false PPAs in order to become eligible to receive Title IV funds constituted false claims, or

caused the submission of false claims, to the government in violation of 31 U.S.C. §§ 3729(a)(1) & (a)(2) & (a)(3).

After the government declined to intervene in this *qui tam* suit, OCU moved to dismiss respondent's complaint on various grounds arguing, among other things, that the complaint failed to allege an actionable "false claim" under the FCA. The district court agreed, concluding that the complaint failed to satisfy the first element for FCA liability, "because OCU did not make a claim in order to receive government funds." Pet. App. 18a. The court reasoned that "[t]he PPAs are not claims because they do not directly demand money from the government," and further held that "the PPAs do not qualify as certifications of compliance with the HEA." *Ibid.* In support of its conclusion that the PPAs "are not demands or claims for government money," the court emphasized that "the interim steps of the students applying for, receiving, and conveying the Title IV funds from the government to OCU make it impossible for the PPAs to function as direct claims for government funds." Pet. App. 20a.

3. The court of appeals reversed. Pet. App. 1a-6a. The court began by explaining that the process of obtaining federal student loan and grant funds under the Higher Education Act was divided into multiple steps, involving initial ("phase one") representations regarding a school's eligibility to receive federal funds and later ("phase two") requests for grants and loans from DOE. *Id.* at 1a-2a. Assuming the truth of the respondent's allegations – "that the University (a) knew of the prohibition against paying contingent fees to recruiters, and (b) lied to the Department of Education in order to obtain a certification of eligibility that it could not have obtained had it revealed the truth,"–

the court explained “that the phase-two applications would not have been granted had the truth been told earlier, for all disbursements depended on the phase-one finding that the University was an eligible institution.” *Id.* at 3a. Given these allegations, the court had no difficulty concluding that the complaint stated an actionable claim under the FCA based upon OCU’s false promises of compliance with the incentive compensation ban, because OCU’s statements in phase one of the funding process were the necessary predicate for all subsequent requests for government money in phase two of the funding process.

While noting that “no published appellate decision to date has addressed the question whether a multistage process forecloses liability for fraud in the first stage,” the court of appeals stated that “the answer is straightforward” under the plain text of the FCA. Pet. App. 3a. Citing 31 U.S.C. § 3729(a)(2), which imposes liability on “anyone who ‘knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government,’” the court explained that OCU was alleged to have done precisely what the FCA prohibits:

The University ‘uses’ its phase-one application (and the resulting certification of eligibility) when it makes (or ‘causes’ a student to make or use) a phase-two application for payment. No more is required under the statute. The phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn’t true.

Id. at 3a. The court emphasized that “[t]he statute requires a causal rather than a temporal connection between fraud and payment,” and concluded that, “[i]f a false statement is

integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.” *Id.* at 3a-4a.

Having held that the allegations in the complaint were sufficient to state a claim under the plain language of 31 U.S.C. § 3729(a)(2), the court of appeals had no occasion to address whether those allegations might also satisfy the requirements for FCA liability under an alternative theory of implied certification. Instead, the court devoted the remainder of its decision to rebutting arguments made by OCU. For example, the court specifically rejected OCU’s argument that its “approach would treat any violation of federal regulations in a funding program as actionable fraud.” Pet. App. 4a. Noting that “fraud requires more than breach of promise,” the court explained that “fraud entails making a false representation, such as a statement that the speaker will do something it plans not to do.” *Ibid.* Thus, the court summarized, “[t]ripping up on a regulatory complexity does not entail a knowingly false representation.” *Ibid.*

In addition, the court rejected OCU’s reliance on a DOE policy memorandum providing guidance concerning enforcement of violations of the incentive compensation ban. Noting that the memorandum “has no legal effect” because it was not the product of notice and comment rulemaking, the court emphasized that the Department of Justice “filed a brief as *amicus curiae* in this court contending that the allegations of the complaint, if true, demonstrate a right to recover under the False Claims Act,” and that this “view, and not one implied by a back-office memo, represents the position of the United States.” Pet. App. 5a. Moreover, even taking the memorandum at face value, the court concluded that it did not provide “much assistance” to OCU because it

states only “that a violation of the rule against incentive compensation usually does not lead to financial loss to the United States – for any given student may well have enrolled, and been eligible, anyway.” *Ibid.* As the court explained, this statement does not support OCU’s argument “that a fraudulent certification does not violate the False Claims Act,” because the FCA “provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify, and at the margin contingent payments will lead to *some* unwarranted enrollments (and thus some unjustified federal disbursements).” *Ibid.* (emphases in the original).

REASONS FOR DENYING THE PETITION

The court of appeals held that the False Claims Act imposes liability not only for the direct submission of false claims to the government but also for making knowingly false statements concerning eligibility for government benefits that *cause* the submission of later claims for payment in a multiple-step government_funding process. That decision reflects the common sense proposition that the FCA prohibits lying to obtain government benefits in all its forms, whether or not the initial lie to obtain eligibility for government funds is expressly reiterated in the actual request for money submitted to the government. That decision also tracks the plain language of the FCA, which applies broadly to any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” 31 U.S.C. § 3729(a)(2).

In addition to being correct, the court of appeals’ decision does not conflict with decisions from any other circuit. Contrary to petitioner’s arguments, the decision below does

not implicate the distinction some circuit courts have drawn (for purposes of implied certification liability) between “conditions of payment” and “conditions of participation” in federal funding programs. Nor does the decision below “conflict” with the Fifth Circuit’s unpublished memorandum dispositions of cases involving similar claims. Given the lack of any conflict among the circuits on the issues presented in this case, and the interlocutory nature of the decision below, review by this Court is not warranted. The petition for a writ of certiorari should be denied.

A. The Court of Appeals’ Decision Is Correct.

The court of appeals properly concluded that respondent’s allegations that OCU lied about its compliance with the incentive compensation ban in order to obtain (and maintain) its eligibility to receive Title IV funds stated a valid claim for relief under the False Claims Act. Relying on the plain language of Section 3729(a)(2), which prohibits the knowing use of “a false record or statement to get a false or fraudulent claim paid or approved,” 31 U.S.C. § 3729(a)(2), the court explained that “[t]he University ‘uses’ its phase-one application (and the resulting certification of eligibility) when it makes (or ‘causes’ a student to make or use) a phase-two application for payment.” Pet. App. 3a. Thus, the court properly recognized that the FCA extends not merely to false claims submitted directly to the government but also to false statements that *cause* the government to pay out money, so long as there is an adequate causal nexus between the fraud and the payment. *Id.* at 3a-4a (“If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.”).

The court of appeals' recognition that a person may be liable under the FCA not only for submitting a false claim directly to the government but also for causing others to submit false claims is not only consistent with the plain language of the FCA but also with a long line of decisions by this Court. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976) (noting that FCA "gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541-45 (1943) (holding electrical contractors who rigged bids on municipal contracts funded by federal government liable for causing municipalities to submit false claims); *Tanner v. United States*, 483 U.S. 107, 129 (1987) (noting prior cases in which the Court "recognized that the fact that a false claim passes through the hands of a third party on its way from the claimant to the United States does not release the claimant from culpability under the Act"). Indeed, this Court has recognized that the FCA extends broadly "to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). Likewise, the legislative history of the 1986 amendments confirms that the FCA applies "even though the services are provided as claimed if, for example, the claimant is *ineligible to participate in the program*." S. Rep. 345, 99th Cong., 2d Sess., at 9, reprinted in 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added).

Nowhere in its petition does OCU acknowledge the straightforward textual basis in the FCA for the court of appeals' decision or the many decisions of this Court recognizing that false statements that *cause* the submission of false claims are actionable under the FCA. Indeed, OCU offers no argument whatsoever that the court of appeals' decision was wrong based upon the plain language of the FCA or any decisions by this Court. Instead, OCU contends primarily that the decision below

conflicts with decisions by other courts of appeals. *See* Pet. at 12-23. As explained in the next section, however, OCU's claim of "conflict" rests on a mis-characterization of what the court of appeals in this case actually held and exaggerated claims regarding an unpublished Fifth Circuit memorandum opinion summarily affirming the dismissal of FCA claims in a similar case.

B. The Court of Appeals' Decision Does Not Conflict With Precedential Decisions By Any Other Court of Appeals.

The court of appeals' essential holding – that OCU's knowing false promises to comply with a statutory prerequisite for receiving Title IV funds are actionable under Section 3729(a)(2) of the FCA because all later disbursements of student loan and grant funds depended on these false statements – is not contrary to the precedential decision of any other court of appeals. As the Court of Appeals in this case recognized:

Although no published appellate decision to date has addressed the question whether a multi-stage process forecloses liability for fraud in the first stage, the answer is straightforward. The False Claims Act covers anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government".

Indeed, no court of appeals has ever held that a person may lie in the eligibility phase of a multi-stage process to obtain government benefits (*e.g.*, to establish threshold eligibility for veterans' benefits, hurricane relief benefits, or any other form of federal assistance) and then avoid FCA liability simply because the requests for money actually submitted to the government do not expressly reiterate the false statement upon which the person's eligibility for benefits depends.

In an effort to manufacture a circuit split, OCU completely ignores the straightforward textual basis for the court of appeals' decision and focuses instead on issues that are not implicated in that decision. For example, OCU argues that "Review is warranted to resolve a circuit split regarding whether FCA liability may arise from an uncertified statement that is not a precondition of payment." Pet. at 12. But the cases OCU cites in support of this contention all involved FCA liability under an "implied certification" theory – a theory that OCU acknowledges the court of appeals did *not* adopt. See Pet. at 15 n.4 ("The Seventh Circuit below did not find that OCU had made an implied certification and, indeed, the Seventh Circuit has not expressly considered the issue of implied certification.")¹ Because the court of appeals ruled exclusively on the ground that OCU's false statements in its PPAs were actionable under Section 3729(a)(2), no plausible basis exists for arguing that the decision below conflicts with decisions in other courts of appeals outlining the requirements for liability under an implied certification theory.

In any event, even assuming the implied certification decisions cited by OCU are deemed relevant, they do not conflict with the court of appeals' decision in this case. First, to the extent some of these decisions distinguish between false statements regarding general conditions of participation and "conditions of payment," see *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001), these decisions do not conflict with the decision below because compliance

1. No Seventh Circuit judge in regular active service requested a vote on OCU's Petition for Rehearing en banc and all of the judges on the panel voted to deny rehearing. Pet. App. 25a-26a.

with the incentive compensation ban is both a condition of participation *and* a condition of payment. As the court of appeals recognized, the Higher Education Act expressly conditions a school's "initial and continuing eligibility" to participate in Title IV programs upon compliance with the incentive compensation ban and other requirements. *See* 20 U.S.C. §§ 1094(a) & (a)(20); 34 C.F.R. 668.14(b)(22)(I). Because DOE has authority to withhold payment of funds based upon non-compliance with statutory requirements, *see* 20 U.S.C. § 1094(c)(1)(G); 34 C.F.R. 668.83, compliance with the incentive compensation ban is potentially relevant not only to DOE's decision whether to terminate a school's *participation* in Title IV programs but also to its decision whether to *pay* specific claims or withhold funds. Thus, the decision below is fully consistent with decisions requiring the false statements regarding conditions that are prerequisites to the receipt of government benefits. *See, e.g., United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996).

Likewise, OCU's contention that the FCA does not extend to "uncertified" false statements, *see, e.g., Pet. at* 12, 17-20, is contrary to the plain language of the FCA and unsupported by decisions in any other court of appeals. As the court of appeals in this case properly recognized, it makes no difference whether OCU's promises to comply with the incentive compensation ban are "certifications" or promises; what matters is that they are express false statement regarding a condition that is a prerequisite to the receipt of government benefits. On its face, the FCA is not limited to false "certifications" but extends broadly to the use of a "false statement or record to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). As a result, no court of appeals has ever imposed an extra-statutory "certification" requirement for a false statement to be actionable. Instead, the courts have

routinely upheld FCA liability where there was no false "certification," so long as "the contract or extension of government benefits was obtained originally through false statements or fraudulent conduct." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 (4th Cir. 1999). Although at least one court of appeals has stated that "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit," *Hopper*, 91 F.3d at 1266 (emphasis added), the court used that terminology solely because the false statement at issue in that case happened to be a "certification" of compliance with certain regulatory requirements, not because a "certification" was necessary for FCA liability. In short, OCU's suggestion that the decision below creates a conflict in the circuits on the question whether a false statement must be a "certification" in order to be actionable under the FCA is wholly without merit.

OCU also complains that, "[u]nder the reasoning of the Seventh Circuit, [it] would potentially be liable for its non-compliance with any ED regulation pertaining to student aid programs," because the PPA and applicable regulations make compliance with all statutory and regulatory requirements prerequisites for Title IV program eligibility. Pet. at 16. As the court of appeals recognized, however, the FCA does not impose liability simply for non-compliance with regulatory requirements; the statute forbids *knowing* false representations concerning compliance with conditions that are prerequisites for obtaining government benefits. Pet. App. 4a ("Tripping up on a regulatory complexity does not entail a knowingly false representation."). Thus, OCU's suggestion that the decision below conflicts with decisions in other circuits emphasizing that "[m]ere regulatory violations do not give rise to a viable FCA action," *see Hopper*, 91 F.3d at 1267, rests on a blatant mis-characterization of the decision.

Finally, OCU's contention that the decision below conflicts with an unpublished decision by the Fifth Circuit, Pet. at 20-23, is both misleading and wrong. The entire memorandum opinion on which OCU relies, *United States ex rel. Graves v. ITT Educational Servs, Inc.*, No. 03-20460, is included at Pet. App. 185a-187a. While that *per curiam* opinion affirms a published district court decision dismissing FCA claims similar to those in this case, see 284 F. Supp. 2d 487 (S.D. Tex. 2003), the opinion itself clearly states that "the Court has determined that this opinion should not be published and is *not precedent* except under the limited circumstances set forth in 5th Cir. R. 47.5.4." Pet. App. 185a (emphasis added). For the same reason, OCU's reliance on two other unpublished Fifth Circuit opinions which simply followed *Graves*, Pet. at 22, is also unavailing, because those decisions are not circuit precedent that could form the basis for a plausible claim of circuit conflict warranting certiorari. Even on their face, however, nothing in these decisions conflicts with the court of appeals' decision in this case.²

C. The Court of Appeals' Decision Is Interlocutory.

A final reason for denying the petition in this case is that the decision below is interlocutory. See *Brotherhood of Locomotive Firemen v. Bangor & Aroostook RR.*, 389 U.S.

2. Although OCU suggests that the "*Graves* court" distinguished between "certifications" and general statements of compliance with regulatory conditions and concluded that compliance with the incentive compensation ban was not a condition of payment, Pet. at 21-22, this is highly misleading, because the language OCU cites appears exclusively in the district court's decision. None of this language or analysis is repeated anywhere in the Fifth Circuit's unpublished and expressly non-precedential memorandum opinion.

327, 328 (1967) (“[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.”). Absent extraordinary circumstances, this Court “generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction.” *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). Because petitioner has not identified any extraordinary circumstances warranting a departure from this rule, review of the interlocutory ruling by the court of appeals is not warranted.

In addition, because the legal question presented in this case is relatively novel, it would benefit from further percolation in the lower courts. A case involving similar legal issues is currently pending before the Ninth Circuit, see *United States ex rel. Hendow v. Univ. of Phoenix*, No. 04-16247 (argued Feb. 15, 2005), and that case will present a more suitable vehicle for review should any true conflict develop within the circuits.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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